IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-680

WALL STREET TRANSCRIPT CORPORATION and RICHARD A. HOLMAN,

Petitioners,

—vs.—

WAINWRIGHT SECURITIES INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Wall Street Transcript Corporation and Richard A. Holman, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on June 15, 1977, which affirmed the injunction issued by the District Court.

Opinions Below

The opinion of the Court of Appeals, Second Circuit, appended hereto, is reported in 558 F. 2d 91. The opinion of the United States District Court for the Southern District of New York, appended hereto, is reported in 418 F. Supp. 620. Jurisdiction of the District Court was based on the Copyright Act and under 28 U.S.C. § 1338.

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1977. Appendix A, infra. A timely petition for rehearing (filed June 29, 1977) was denied on August 16, 1977. (Appendix A, p. 30a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. May a Court enjoin a newspaper and its editor, under the Copyright Act, in advance of publication, from exercising its First Amendment rights to report news stories on research reports which may be, but have not yet been, written by respondent and hence are not yet copyrighted, regardless of the newsworthiness of such research reports or of their impact on the general public?

2. Where the petitioners' newspaper and editor, have published brief accurate news stories on newsworthy research reports issued and copyrighted by the respondent, does the First Amendment require that the rights of the copyright proprietor be subordinated to the petitioners' right to publish accurate news stories on newsworthy

statements and the public's right to be informed about statements that have an impact on a large segment of the public?

Constitutional Provision and Statutes Involved

The pertinent constitutional and statutory provisions are set forth in Appendix B, infra (pp. 34a-36a).

Statement*

This is an action for an injunction, and ancillary relief under the Copyright Act, to enjoin the petitioners from distributing five issues of their newspaper with news stories on research reports issued and copyrighted by the respondent, and to enjoin the publication by petitioners, in the unlimited future, of news stories on any reports respondent might issue at any time in the future and then copyright. Both injunctions were granted.

The reports involved are stockbroker research reports, which are deemed important news because they often have significant economic or financial impact and hence impact the public generally (237a). The Court below noted that news stories on these reports appear in The Wall Street Journal (Appendix A, p. 11a).

The respondent is a major stock broker, regarded by many as one of the most important and powerful in the investment field (136a). It caters principally, if not exclusively, to some 900 large institutional investor clients including most of the major banks, insurance companies,

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* Figures in parentheses refer to pages in joint appendix in the Court below unless otherwise noted.

mutual funds and similar clients (6a). It prepares research reports on publicly traded companies which it copyrights and then provides to its 900 clients only (5a-6a).

Respondent appears to use inside corporate information in preparing its research reports; thus it describes its research reports as follows (6a):—

> "A Basic Report provides an in-depth study of a company with particular emphasis on current operations and the near-term and longer-range outlook, together with a review of the company's historical operating record. It contains sections concerning management, accounting policies, company and industry business characteristics, flow-of funds and balance sheet analysis, and dividend policy. *Basic Reports are based upon interviews with one or more company officials.* A Special Report generally concerns a major development at a company." (Emphasis supplied).

The respondent also says that all of such "sources of information" (132a), including of course the company officials provide "important inputs" to the reports (132a); and that the "Basic Reports" are circulated to company management for comment (133a).

According to respondent, the research reports are fundamental to the making of investment decisions. Indisputably the research reports are thus newsworthy. Thus respondent said (136a):—

> "The Research Reports are, in my opinion, the reason Wainwright is able to obtain and keep its institutional clients, which use the Research Reports *as fundamental input in their investment decision making process.* Indeed, for the past two years, Wainwright has had the largest number of securities

> analysts rated as outstanding by Institutional Investor magazine, the leading trade publication in the institutional investment field" (Emphasis supplied).

The petitioners are well described by the Court of Appeals as follows (Appendix A, pp. 2a-3a):

> "The Wall Street Transcript Corporation publishes the Wall Street Transcript ("Transcript"), a weekly newspaper concerned with economic, business, and financial news. The appellant Richard Holman is the chairman and sole stockholder of the publishing company, and has, apparently, editorial control of the newspaper. The Transcript's subscribers include colleges, libraries, lawyers, brokers, accountants and corporations. It is available to the public by subscription or at some newsstands."

The Transcript has been widely recognized as the newspaper where the public and individual investors may learn about important, impactful reports such as those issued by the respondent. Indeed, advertisements of the petitioners addressed to the public were headed "You Have a *Right* to Know" (164a).

On the other hand, before this suit started, respondent went on record that it would use the copyright laws to prevent the media from reporting to the public on respondent's reports (236a).

In the issues of the Transcript enjoined from distribution the news stories on reports issued by the respondent amounted to less than 1/1000 (one/one-thousandth) of the issue (233a).

The part published by petitioners was a relatively small part of the entire research report—thus the news account

of a seven page research report, consisted of nineteen lines (185a); the news account of a 26 page research report consisted of thirty-one lines (186a); the news account of a ten page research report consisted of twenty-seven lines (186a); the news account of a six-page research report consisted of 33 lines (186a); and the news account of a 41 page research report consisted of 36 lines (187a).

The District Court enjoined petitioners from further distribution of accounts published in the Transcript of five research reports previously copyrighted, and in addition enjoined petitioners from publishing accounts of research reports not yet written and hence never even copyrighted or read by the District Court (247a-8; 226a). The District Court dismissed the First Amendment as not really applicable to copyright matters because, said the Court, the doctrine of fair use has been precisely contoured to preclude any tension between the First Amendment and the copyright laws.

The District Court said in this respect (Appendix A, p. 21a):

> "The tension between the First Amendment and the copyright statute which the Transcript professes to discern in such cases as this does not exist. It does not exist because the doctrine of fair use, discussed below, has been precisely contoured by the courts to assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation".

The precise contour of fair use which the District Court discerned is to be contrasted to the District Court's statement that the fair use doctrine is of "quicksilver content" (Appendix A, p. 23a). No matter how the issue is perceived fair use, which has now been codified (15 U.S.C. § 107), is no substitute for freedom of the press.

The Court of Appeals, in affirming the judgment of the District Court, purported to meet the First Amendment issue head on; although neither the District Court nor the Court of Appeals attempted to justify an injunction with respect to research reports not yet written and hence not yet copyrighted (Appendix A, pp. 1a-29a).

The Court of Appeals also indicated that fair use was a substitute for freedom of the press. The Court of Appeals said (Appendix A, p. 8a):

> "The question of the first amendment protections due a news report of a copyrighted research report is a provocative one. Conflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine. E.G., *Walt Disney Productions* v. *Air Pirates*, 345 F. Supp. 108, 115 (N.D. Cal. 1972); *McGraw-Hill, Inc.* v. *Worth Publishers, Inc.*, 335 F. Supp. 415, 422 (S.D.N.Y. 1971). Some day, legitimate in-depth news coverage of copyrighted, small-circulation articles dealing with areas of general concern may require courts to distinguish between the doctrine of fair use and 'an emerging constitutional limitation on copyright contained in the first amendment'. Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. Rev. 1180, 1200 (1970). *See* Patterson, *Private Copyright And Public Communication: Free Speech Endangered*, 28 Vanderbilt L. Rev. 1161 (1975). But, this is not the case."

The Courts below have held that they may dictate to the press, in advance of publication, what news and edi-

torial matter it may or may not publish. These rulings disregard the important newsworthiness of the material already issued by respondent. The Court-imposed ban on publication of stories about reports which the respondent may make in the future is applicable regardless of the newsworthiness of the statements contained therein or the wide-spread impact or repercussions the statements made may thereafter have on the public.

These rulings go to the very heart of news reporting which consists, primarily in reporting to the public what someone has said. Since the Courts below have said that practically any written matter may be copyrighted (Appendix A, p. 19a), the implications of the holdings below on the First Amendment rights of the press to report on important newsworthy matter can be devastating if the copyright laws can be utilized to prevent news reporting. The decisions of the Courts below will most certainly have a "chilling" effect on the First Amendment rights of the petitioners and of the press when faced with the dilemma of how to report on a highly newsworthy statement that bears a copyright label.

While the question of the rights of the press to report on newsworthy statements despite objections by the news source has been alluded to in at least one recent decision of this Court, the question of the proper balance between the First Amendment rights of the press, including the public's right to know, and the rights of copyright proprietor have never been determined by this Court.

The Court of Appeals laid down a standard which, if it remains as controlling authority, effectively bars any news reporting on a copyrighted statement, no matter how newsworthy that statement may be. The Court of Appeals set forth a list of what the press cannot report (Appendix A, pp. 8a-9a):

> "What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshalls facts, his choice of words, and the emphasis he gives to particular developments".

If the Press is required to eliminate all of the foregoing from a news story on an important statement, there is then no meaningful reporting at all. There is only watered down reporting which is utterly uninformative to the publice and is not the kind of news reportage that the First Amendment is meant to foster.

Moreover, most news in the economic, business and financial field consists of stories of what someone has said rather than of what somebody did. The Court of Appeals would in effect permit the copyright laws to prevent publication of such news, especially if the press sought to publish the important parts of what was said. The Court of Appeals would virtually limit the press to reporting that a person made a statement on a particular subject without any reporting of the essential elements of the statement (Appendix A, p. 8a). That is utterly inconsistent with what this Court has ruled was the essence of legitimate journalism in *Time, Inc.* v. *Pape,* 401 U.S. 270 (1971). In *Pape,* this Court pointed out that much, if not most, news consists of what somebody has said and that direct quote from the news source was probably the best and safest course of journalism. This Court there said (p. 285):—

> "But a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did.* Indeed, perhaps the largest share of news concerning the doings of government appears in the

form of accounts of reports, speeches, press conferences, and the like. The question of the 'truth' of such an indirect newspaper report presents rather complicated problems.

A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings. Where the source of the news makes bald assertions of fact—such as that a policeman has arrested a certain man on a criminal charge—there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify. Any departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices."

It is, inter alia, because much, if not most news, consists in reporting what someone has said that the First Amendment right of the press to report news and the public's right to know cannot be subordinated to the property rights created by the copyright laws, or else the free press becomes meaningless and the public remains uninformed.

Reasons for Granting the Writ

Question No. 1

The Courts below ruled that the copyright laws authorize a prior restraint upon the publication of news accounts or abstracts of matter not yet written and hence not yet copyrighted. No one can tell how newsworthy the matter may be when it is written, nor the impact such matter may have upon the public. Indeed, the respondent claims that

all of its research reports are basic to decision making by its 900 clients (136a). Hence it must be assumed that these unwritten reports will be newsworthy and also be basic to decision making when, as and if written. The decisions below thus esconced prior restraints against the press to an absolute zenith.

The copyright laws are certainly no different from any other statute when weighed against the First Amendment. The Constitution (Art. 1, Sec. 8) grants no rights to authors; it merely authorizes Congress to enact copyright laws and necessarily the power vested in Congress is subjected to and cannot impinge upon First Amendment rights.[1] So far as copyright laws are concerned the Constitution is permissive, not mandatory.[2] On the other hand this Court guards the First Amendment "with a jealous eye".[3]

But the Courts below have ensconced the copyrights laws above other statutory rights. They have not guarded the First Amendment with a jealous eye, and when confronted with a direct tension between the First Amendment and a mere statute, they opted for the statute.

The judgment of the Court below is particularly dangerous because it not only vitiates the right of the Press to report the news, but it strikes at the economic well-being of some 25,000,000 direct individual shareholders and

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[1] *Wheaton* v. *Peters*, 33 U.S. 591, 661, 663 (1834); *Mazer* v. *Stein*, 347 U.S. 201, 214 (1954); *Krafft* v. *Cohen*, 117 F. 2d 579, 580 (2 Cir. 1941).

[2] *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U.S. 518, 530 (1972).

[3] *A.F.L.* v. *Swing*, 312 U.S. 321, 335 (1941).

countless other millions who are affected by economic conditions. It jeopardizes this nation's free enterprise system by destroying public access to statements that have a direct and important impact on them.

The dangerous impact of the judgment below is summed up by the leading news columnist for the Wall Street Journal who was quoted in "Editor and Publisher", the bible of the press, as commenting on the Court of Appeals' opinion less than two weeks after it was handed down: "I don't see how you can have any reports that are proprietary if they have an impact on the investing public" (Editor and Publisher June 25, 1977, p. 7).

Editor and Publisher had previously editorialized against the use of the copyright laws to prevent dissemination of news. (See editorial entitled Copyright and news reporting, Editor, and Publisher, April 16, 1977, p. 6).

A few days later on June 30, 1977 the Wall Street Journal (p. 35) carried a long news story on one of respondents' copyrighted research reports, as to which the petitioners were enjoined from publishing even before respondent wrote the research report (Appendix C).

The respondent asserts that its research reports are fundamental to the making of important economic decisions by its 900 large clients (136a). But limiting this important news to those chosen few, constitutes a clear danger to this nation's economic system. Indeed, Mr. James W. Davant, Chief Executive Officer of one of the largest investment banks and brokerage firms pointed out in a speech entitled: "Free Marketing and the Individual Investor" (Transcript, Nov. 14, 1977, pp. 48, 816). "More and more individual investors see the market as a playground of the powerful few". The judgment of the Court below can only reinforce and justify that belief which is

so dangerous to this nation's economic health. In short, the copyright laws cannot be permitted to be utilized so that there is an informed powerful few and an uninformed general public, thereby destroying confidence in this nation's entire economic system.

Moreover the injunction sweeps unwritten and uncopyrighted matter under the protection of the copyright laws irrespective of its news content or importance to the general public and irrespective of whether or not it may properly be the subject of copyright. We submit that never before have the copyright laws been so extended nor has the First Amendment ever been so cavalierly treated.

This prior restraint as to unwritten and uncopyrighted matter comes before this Court with a heavy presumption against its constitutional validity. As this Court has repeatedly ruled.[4]

> "'Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity' [citations omitted].
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> "'It is elementary of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near* v. *Minnesota*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 623 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights".

The thesis of the Courts below that somehow the copyright laws escape the mandate of the First Amendment

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[4] *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 (1971); see also: *Near* v. *Minnesota ex rel Olson*, 283 U.S. 697, 713 (1931).

because of the illusory and quicksilver content of the doctrine of fair use simply will not square with the First Amendment and this Court's guarding of the same. The purpose of the First Amendment is to preserve an uninhibited market place of ideas in which truth will ultimately prevail; it preserves inviolate the right of the public to all sorts of information, political, social and economic, especially where, as here, the economic news is concededly fundamental in decision-making and has public impact.[5]

This is a nation which still adheres to a free enterprise economy. The allocation of its resources and the political implications thereof still rest in large measure on numerous private economic decisions. It is a matter of public interest that these decisions be intelligent and well informed.[6] And as this Court made clear in *Virginia Consumers*, since the allocation of resources depends upon a free flow of economic information, necessarily that same information is essential to a determination of how this nation's political institutions should be regulated.

When statements are made by powerful people; when these statements can and do have major impact on millions of people, the statements are highly newsworthy and the public has a right to know about them. And the Court cannot, as both courts did here, "escape the task of assessing the First Amendment interest at stake . . ." *Linmark Associates Inc.* v. *Willingboro,* —— U.S. ——, 52 L. ed. 2d 155 at 161 (1977).

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[5] *Red Line Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969); *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 311 (2 Cir. 1966) cert. den. 385 U.S. 1009 (1967).

[6] *Virginia State Board of Pharmacy* v. *Virginia Consumers Council*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *Linmark Associates Inc.* v. *Willingboro,* U.S. , 52 L. ed. 2d 155 (1977).

This Court has struck down time and again statutes or rules which impinged upon the public's right to know.[7] The mere fact, if it be a fact, that petitioners published accounts of respondent's research reports in order to sell their newspaper, as the Court below indicated (Appendix A, p. 12a) is wholly irrelevant. The respondent claims that it copyrights its research reports for monetary gain (6a), and that too is wholly irrelevant.

Obviously every newspaper is published in the hope of making a profit through sales and advertising; and lawyers and others advertise for the same purpose. Yet where, as here, the matter published is newsworthy or has public impact, the fact that it is commercial speech in which the petitioners have an economic interest does not withdraw the same from First Amendment protection.[8]

The competing interests here are respondent's desire to profit through its research reports and against that stands the freedom of the press and the general public's right to know what is impacting the public. Under such circumstances respondent's desire must yield to the First Amendment's virtually insurmountable barrier between government and the press and the consumers need for the free flow of news and commercial information; and the copyright laws thus cannot stand athwart the First Amendment.[9]

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[7] *Bates* v. *State Bar of Arizona,* U.S. , 53 L. ed. 2d 810 (1977); *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Smith* v. *California*, 361 U.S. 147 (1959).

[8] *Bates* v. *State Bar of Arizona,* U.S. , 53 L. ed. 2d 810 (1977).

[9] *Bates* v. *State Bar of Arizona,* U.S. , 53 L. ed. 2d 810 (1977); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Linmark Associates, Inc.* v. *Willingboro,* U.S. , 52 L. ed. 2d 155 (1977); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 259 (concurring opinion) (1974).

Respondent has shown nothing, and neither have the Courts below, to overcome the heavy presumption against the constitutionality of the prior restraint barring the petitioners from publishing accounts of unwritten, and thus uncopyrighted, research reports. At this point in time, no one can tell how newsworthy or important those unwritten research reports may be. However, respondent claims that all of its research reports are fundamental to the making of important economic decisions by the 900 chosen few. Taking respondent at its word, it is obvious that the same research reports have major public impact and the public is entitled to take this into account. The petitioners thus are serving the highest societal interest in assuring informed and reliable decision making, by publishing to the world the analyses and conclusions contained in the research reports.

The copyright laws are no more or less constitutionally permissible than any other statute designed to impede the free flow of information. None of these statutes has as yet been sustained by this Court especially where, as here, it is conceded that the restraint operates against the publication of material fundamental to important decision making. We submit that the Courts below have gone against the main stream of constitutional decisions of this Court; that the Courts below have established a dangerous precedent which seriously impedes the free flow of essential information; that the Courts below have extended the copyright laws beyond their constitutional limitations and that it is utterly essential at this time that this Court limit the copyright laws to their proper place in this nation's economy.

Neither of the Courts below referred to *Miami Herald Publishing Company* v. *Tornillo*, 418 U.S. 241 (1974) although that unanimous decision of this Court expressed in a series of three separate opinions, makes it crystal

clear that the Government cannot become involved in tampering with the content, the layout, or anything else involving the judgment of the Press. In short, as Mr. Justice White pointed out, concurring.[10]

> "According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. *New York Times Co.* v. *United States*, 403 U.S. 713, 29 L Ed 2d 822, 91 S Ct 2140 (1971). A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed."

And Mr. Chief Justice Burger, delivering the opinion of the Court pointed out.[11]

> "Compelling editors or publishers to publish that which 'reason' tells them should not be published' is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244-245, 80 L Ed 660, 56 S Ct 444 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper".

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[10] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 at p. 259.

[11] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 at p. 256.

And the Chief Justice quoting from *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U.S. 376 (1973) made it very clear that no law an impose any restraint whatsoever whether of content or layout on stories or commentary of the press. The Chief Justice there said.[12]

> "'Nor, a fortiori, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.'
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> "Dissenting in *Pittsburgh Press,* Mr. Justice Stewart, joined by Mr. Justice Douglas, expressed the view that no 'governmental agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot.'"

There is nothing of societal interest in limiting this important economic news to the chosen few. There is no reason why the copyright laws may be utilized to give important advantages to a chosen few.

Question No. 2

The Courts below enjoined petitioners from further publication of accounts of five research reports which had been copyrighted. In doing so the Courts below overrode petitioners' arguments that the research reports were newsworthy, fundamental to the making of important

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[12] *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 at pp. 255-6.

economic decisions, and that the copyright laws must accordingly yield to the command of the First Amendment. Both of the Courts below thought that the elusive and quicksilver doctrine of fair use was an adequate substitue for the First Amendment protections.

We submit that the copyright laws were not designed to frustrate the right of the public to be informed of important matters which are fundamental to the making of informed economic decisions; that public welfare is not advanced by giving copyright protection to these research reports; and that the Courts below ensconced the copyright laws to a status superior to that of the First Amendment.

This Court has made it clear that the purpose of the copyright laws is to encourage new effort by personal gain to advance public welfare through the talent of authors and inventors in science and useful arts; that the reward to the copyright owner is only a secondary consideration; and that the copyright laws were designed to afford greater encouragement to the production of works of benefit to the public.[13]

But it is obvious that limiting the distribution of these research reports to the chosen 900 could not possibly in any way advance public welfare or benefit the public. To the contrary, the limitation of this matter fundamental to decision making (as respondent asserts), to the chosen 900 is detrimental to the public welfare and of no benefit whatsoever to the public. It is thus clear that the Courts below have permitted respondents to utilize the copyright laws for an improper purpose, not authorized by the Constitution.

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[13] *Zacchini* v. *Scripps-Howard Broadcasting Co.,* U.S. , 53 L. ed. 2d 965 (1977).

The essential difference between the situation at bar and that which existed in *Zacchini* is that at bar the public is deprived of knowledge about what these research reports say which have a direct and important impact on the public, while in *Zacchini* there was no such deprivation. Nonetheless, three Justices of this Court indicated that the complete appropriation of Zacchini's act was proper in the light of the First Amendment. And no prior restraint was sought in *Zacchini*; all that was sought there was money damages.

The majority in *Zacchini* appropriately noted that entertainment, as well as news, enjoys First Amendment protection and that entertainment itself can be important news. Here, the Court does not have to search for any rationale of the newsworthiness of respondents' research reports for respondent itself has declared that its research reports are fundamental to the making of important investment decisions with resulting public impact (136a).

The issue which is directly raised here was alluded to but not directly involved in the *Zacchini* case. *Zacchini* involved the reach of a state law right of publicity which this Court said was closely analogous to the goals of patent and copyright law. While this Court said that it would protect an entertainer against television broadcasting of his entire act, nonetheless this Court noted.[14]

> "It is evident, and there is is no claim here to the contrary, that petitioner's state law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act".

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[14] *Zacchini* v. *Scripps Howard Broadcasting Co.*, —— U.S. ——, 53 L. ed. 2d 965, 976 (1977).

It is reports by brokers, few of whom are as important and powerful as respondent, that have direct impact on millions of individual investors and the public generally. Palpably, the right of the public to be fully informed of such important economic news is far superior to the right of the public to view for free on television Zacchini's act. Zacchini did not claim that his act had impact on the economic life and strength of this nation; but at bar the respondent must concede that its research reports have widespread public impact. They are thus newsworthy in their entirety and hence the very reason why this Court protected Zacchini's entire act is absent here. This Court made it clear that the right of publicity could not bar reporting the newsworthy facts about Zacchini's act and by the same token the copyright laws cannot be utilized to prevent the press from publishing brief news stories of these reports.

The District Court indicated (Appendix A, p. 20a) that perhaps the petitioners could publish that the respondent had issued a report on a particular company and perhaps whether it was favorable or unfavorable, bullish or bearish.

But that watered down reporting is utterly uninformative to the public and is hardly the kind of news reportage that the First Amendment is meant to foster.[15] This Court has made it clear that the editorial policy of a newspaper and what it does or does not publish is of no concern to the Courts. A statute may not exact a penalty on the basis of the content of a newspaper and yet that is precisely what the Courts below have held the copyright laws may do. Accordingly, the decisions of the Courts

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[15] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 257-8 (1974).

below are squarely in conflict with an unbroken line of authority laid down by this Court.[16]

It is this aversion of this Court to telling a newspaper in advance what it can or cannot print which has permeated this Court's decisions that prior restraints are anathema to the First Amendment. No doctrine of fair use or any other doctrine can immunize a statute from the mandate of the First Amendment. Commercial and economic news is the core of this nation's free enterprise system. The system itself cannot survive in the absence of an informed general public especially where, as here, there has been carved out from the general public a miniscule class which is informed to the detriment of the general public which bears the brunt of the impact.

The Courts below have treated the copyright laws as though they were sacrosanct; and they have likewise treated the petitioners as though they were a public utility subject to reasonable governmental regulation in matters affecting the exercise of journalistic judgment as to what shall or shall not be printed. The mere fact that respondent may have some sort of a proprietary interest in its copyrighted matter cannot bar the press from informing the general public.[17]

The Court of Appeals misapprehended what it referred to as traditional news coverage (Appendix A, p. 9a). The Court of Appeals said that unlike traditional news coverage, the petitioners did not provide independent ana-

[16] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376, 391 (1973).

[17] Cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 259, Concurring Opinion (1974).

lysis or research nor did they solicit comments on the same topics from other financial analysts and they did not include any criticism, praise or other reaction by industry officials or investors. Rather, said the Court below, the petitioners appropriated almost verbatim the most creative and original aspects of the research reports, viz the financial analyses and predictions (Appendix A, p. 9a).

The Court below simply did not understand how a newspaper works. Much of what is reported in the daily press, as this Court has heretofore noted, is what is said rather than what is done.[18] When the press reports what someone has said, it does not normally solicit comments on the same topics from others nor does the press usually criticize, praise or print other reaction to what has been said. To the contrary, the safest and best form of reporting is to print verbatim that which has been said.[19]

Moreover, under the Court of Appeals' thesis, the petitioners would be required to publish matters which they did not wish to publish in order to give validity to that which they do publish. This is like saying that because a newspaper publishes critical comment about a politician, it can be required to publish comment favorable to that politician. But as this Court squarely held any such requirement runs afoul of the First Amendment.[20]

In short, as this Court has made clear, it is a function of the newspaper, and not of the Courts, to determine what it will or will not print. If a newspaper must print two sides of every question; and must seek the reaction of

[18] *Time, Inc.* v. *Pape*, 401 U.S. 279, 285-6 (1971).

[19] *Time, Inc.* v. *Pape*, 401 U.S. 279, 286 (1971).

[20] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

others to the statements it does print; then the free press as it has been traditionally known in this country will no longer exist.

To exacerbate the situation, the respondent did not adduce a scintilla of evidence to show that petitioners' publication of the news accounts of respondent's research reports in any wise impaired the value of its research reports. To the contrary, the respondent asserted that it derived approximately 90% of its revenues and an even greater percentage of its profits from its institutional research operation (6a); that it was impossible to determine how much business, if any, respondent lost because of petitioners' news accounts (137a); that respondent had no idea whether any of its institutional clients gave business to other brokerage houses because they were upset about petitioners' publications of the accounts (137a); nor did the respondent have any idea how many, if any, potential customers used the petitioners' accounts as the basis for investment decisions (137a).

In short, there is absolutely no evidence that the petitioners' news accounts in any way affected the value of respondent's research reports, qua research reports, or as a means of obtaining business. Indeed, there is evidence that the news accounts published by the petitioners may have actually increased the demand for the original research reports (187a-188a).

Thus, First Amendment rights and the public's right to know have been swept within the main of the copyright laws on the basis of pure surmise and conjecture that untoward consequences may result from the petitioners' publication of the news accounts of respondent's research reports. That is no basis upon which to elevate a purely statutory right to a status free of the First Amendment. Although that publication might, or may or could prejudice a proprietary interest or even the right to a fair trial that is not enough to permit the Courts to shrug off the mandate of the First Amendment.[21]

Certainly, the New York Times did not come before this Court with clean hands in connection with the Pentagon Papers. Certainly the Pentagon Papers were not prepared with the thought in mind that they would be published to the world, especially when they were obtained by devious means at best. Yet this Court made it clear that where disclosure would not surely result in direct immediate and irreparable damage, the command of the First Amendment barred any type of injunction. The copyright laws can reach no higher. They too must yield to the command of a free press.

The petitioners are not in any way in competition with the respondent. The petitioners are in a business which in no wise impinges upon the respondent's business. The petitioners had no axe to grind, no malevolent purpose in mind, in publishing the accounts of respondents' research reports (180a-185a, 190a-191a).

To the contrary, the petitioners were fulfilling the most sacred functions of the press. They were supporting the economic laws of this nation which are based on the concept of full disclosure; full disclosure to everyone; not full disclosure to a chosen few. There is a strong public policy against limiting disclosure to a chosen few and to the detriment of the general public. The private interest of the respondent, asserted under the copyright laws, in limiting the audience to this vital information to its institutional clients, 900 in number, simply cannot prevail against the public's right to know. The public interest must

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[21] *New York Times* v. *United States*, 403 U.S. 713, 725, 730 (1970); *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976).

prevail, and anyone including these petitioners, has a right to assert that public interest.[22]

This case thus poses the issue of a direct confrontation between the First Amendment and the copyright laws. This Court has never decided that precise question. Yet, it clearly appears from the trend of this Court's decisions that the Courts below are wrong and have emasculated First Amendment freedoms, and the public's right to know, which this Court has said is vital to the maintenance of this nation's free enterprise system.

CONCLUSION

In sum, we have a case failing to vindicate constitutional promises and relegating to an inferior status First Amendment freedoms and the public's right to know. This case introduces far-reaching innovations in the sweep of the copyright laws and ensconces the copyright laws in a privileged position superior to the First Amendment. The decisions below appear to be in conflict with decisions of this Court on the same matters and with respect to important constitutional questions which have not been but should be settled by this Court. Moreover, the sweep of the decisions below are in conflict with applicable standards announced by this Court.

The decisions below are extremely dangerous precedents. They could severely curtail that freedom of the press which is essential to a republican form of government. It was not by chance that freedom of the press was embraced within the First Amendment to the United States

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[22] *Harrisonville* v. *Dickey Clay Co.*, 289 U.S. 334, 338 (1933); *Virginia Ry.* v. *Federation*, 300 U.S. 515, 552 (1937).

Constitution. The Courts below have failed to give full faith and credit to the intent of the First Amendment; they have shrugged off freedom of the press and the public's right to know as though it were a secondary standard limited by the copyright laws rather than the other way around.

Dated: New York, N.Y.
November 11, 1977

Respectfully submitted,

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Certification of Service

I, Samuel N. Greenspoon, counsel for petitioners in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of November, 1977, I served copies of the foregoing petition for a writ of certiorari on Wainwright Securities, Inc., Respondent, by causing copies thereof to be mailed in duly addressed envelope, with postage prepaid, to Cahill, Gordon & Reindel, attorneys for the respondent, 80 Pine Street, New York, New York 10005.

Dated: November 11, 1977

SAMUEL N. GREENSPOON
Counsel for Petitioners

APPENDIX A

Relevant Opinions

WAINWRIGHT SECURITIES INC.,

Plaintiff-Appellee,

v.

WALL STREET TRANSCRIPT CORPORATION and Richard A. Holman,

Defendants-Appellants.

No. 937, Docket 76-7468

United States Court of Appeals,
Second Circuit.

Argued April 27, 1977.

Decided June 15, 1977.

Eaton, Van Winkle, Greenspoon & Gutman, New York City (Samuel N. Greenspoon, New York City, of counsel), for appellant Wall Street Transcript Corp.

Richard A. Holman, pro se.

Cahill, Gordon & Reindel, New York City (Roy L. Reardon, Stephen A. Greene, Ira A. Finkelstein, Helene Fromm, New York City, of counsel), for plaintiff-appellee.

Before Medina, Oakes, Circuit Judges, and Mishler, District Judge.*

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* Of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix A

Mishler, District Judge.

This is an appeal from a preliminary injunction entered in the Southern District of New York, prohibiting the defendants-appellants, the Wall Street Transcript Corporation and Richard A. Holman, from publishing in their newspaper abstracts of plaintiff-appellee's copyrighted research reports.

The plaintiff-appellee H. C. Wainwright & Co. ("Wainwright") is a Massachusetts limited partnership, organized in 1868, that is engaged in the institutional research and brokerage business. While the company is registered as a broker-dealer with the Securities and Exchange Commission, Wainwright's specialty, from which it derives most of its profits, is the preparation of in-depth analytical reports on approximately 275 industrial, financial, utility and railroad corporations. These reports, written by analysts employed by Wainwright, examine a company's financial characteristics, trends in an industry, major developments at a company, growth prospects, and profit expectations, and highlight both corporate strengths and weaknesses. The analyst's conclusions and predictions are a major feature of the reports.

Often, a research report requires several months of an analyst's time, some of which is spent interviewing the officials at the company. The reports, which may run as many as 40 pages in length, are used by more than 900 Wainwright clients, including major banks, insurance companies and mutual funds. Wainwright copyrights its reports in accordance with the Copyright Act, 17 U.S.C. §§ 1 *et seq.* (1970 & Supp. 1975).

The Wall Street Transcript Corporation publishes the Wall Street Transcript ("Transcript"), a weekly news-

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paper concerned with economic, business, and financial news. The appellant Richard Holman is the chairman and sole stockholder of the publishing company, and has, apparently, editorial control of the newspaper. The Transcript's subscribers include colleges, libraries, lawyers, brokers, accountants and corporations. It is available to the public by subscription or at some newsstands.

One of the Transcript's major features is the "Wall Street Roundup," a column consisting almost exclusively of abstracts of institutional research reports.[1] Indeed, in advertisements in such publications as Barron's, the Transcript promises readers "a fast-reading, pinpointed

[1] The following is a typical abstract by appellants of a Wainwright report, published in the Wall Street Transcript on May 10, 1976:

> W. D. Williams of H. C. Wainwright & Co. says in a Speciai Report (April 13—7 pp.) on FMC Corp. (25) that 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment. And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year.
>
> His estimated earnings for 1976 is $3.76 per share compared with earnings of $3.24 per share in 1975.
>
> According to Williams, one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate sale of the Fiber Division. He says the company could wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings. And, concerning the tanker situation, he writes that the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility (27a).

account of heavyweight reports from the top institutional research firms." (162a).

In 1974, the Transcript began publishing abstracts of Wainwright's search reports. In April, 1976, Wainwright began copyrighting its reports but, despite protests. Transcript continued to publish the abstracts in the Wall Street Roundup. On July 9, 1976, Wainright began an action pursuant to the Copyright Act, 17 U.S.C. §§ 1 *et seq.*, alleging copyright infringement and unfair trade practices, and seeking injunctive and monetary relief. On August 19, 1976, after a hearing, Judge Lasker granted Wainwright's motion for a preliminary injunction. 418 F. Supp. 620 (S.D.N.Y. 1976). We affirm.

[1-4] In this circuit, a preliminary injunction can be granted if plaintiff shows irreparabble injury, combined with either a probability of success on the merits, or a fair ground for litigation and a balance of the hardships in his favor. *See Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247, 250 (2d Cir. 1973). In copyright cases, however, if probable success—a prima facie case of copyright infringement—can be shown, the allegations of irreparable injury need not be very detailed, because such injury can normally be presumed when a copyright is infringed. *Robert Stigwood Group Ltd.* v. *Sperber,* 457 F.2d 50, 55 (2d Cir. 1972); *American Metropolitan Enterprises of New York* v. *Warner Bros. Records,* 389 F.2d 903, 905 (2d Cir. 1968); *Uneeda Doll Co.* v. *Goldfarb Novelty Co.,* 373 F.2d 851, 852 n.1 (2d Cir. 1967); *Joshua Meier Co.* v. *Albany Novelty Manufacturing Co.,* 236 F.2d 144, 147 (2d Cir. 1956); *Rushton* v. *Vitale,* 218 F.2d 434, 436 (2d Cir. 1955) (Clark, *J.*); see 2 *Nimmer on Copyright* § 157, at 698.4 n.177 (1976 & Supp.). Wainright's claim that most of its profits derive

from its reports, and Judge Lasker's finding that publication of the extracts "may materially reduce the demand for Wainwright's services," sufficiently show irreparable injury under this standard. We need only consider, then, whether a prima facie case of infringement has been made out. Since Wainwright's reports were copyrighted and since no permission was given for publication of the reports in abstract form, a critical question in determining the existence of a prima facie case is whether the Transcript made "fair use" of the Wainwright reports. *See* 2 *Nimmer on Copyright* § 45 (1976).

[5] The doctrine of fair use creates a privilege "in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. . . ." *Rosemont Enterprises, Inc.* v. *Random House, Inc.,* 366 F.2d 303, 306 (2d Cir. 1966), *quoting* Ball, *Copyright and Literary Property* 260 (1944). For example, a classic illustration of fair use is quoting from another's work in order to criticize it. The principle has most often been applied to works in the fields of science, law, medicine, history and biography. The fair use doctrine offers a means of balancing the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science and industry. Put more graphically, the doctrine distinguishes between "a true scholar and a chiseler who infringes a work for personal profit." Hearings on Bills for the General Revision of the Copyright Law Before the House Comm. on the Judiciary, 89th Cong. 1st Sess., ser. 8, pt. 3, at 1706 (1966) (Statement of John Schulman).

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Judge Lasker found that the Transcript's abstracts did not constitute a fair use of the Wainwright reports because (1) the takings were "substantial in quality, and absolutely, if not relatively substantial in quantity," 418 F.Supp. at 625; (2) publication of the abstracts probably reduced the value of Wainwright's research reports; (3) the public interest in dissemination is not affected since the Transcript is not restrained from researching and preparing its own reports; and (4) such reports could be prepared from original materials. *See Marvin Worth Productions* v. *Superior Films Corp.*, 319 F.Supp. 1269, 1274 (S.D.N.Y. 1970).

On this appeal, appellants argue, as they did before the district court, not only that their use of the reports was a fair one, but that publication of the abstracts of the reports is simply financial news coverage entitled to the protection of the first amendment. They point out that Wainwright reports have been reported as news events by the Wall Street Journal and that these accounts include the analyses and conclusions of the original reports.[2]

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[2] According to appellants, the following excerpts appeared in an article in the Wall Street Journal on August 22, 1975:

> "Earlier estimates of a full industry profit recovery in 1976 now seem too optimistic" says Daniel W. Starrett, of H. C. Wainwright & Co., "and the horizon on such a development has probably been pushed into 1977." His views were in a special report to clients that reviewed first half results of six major steel companies.
>
> Mr. Starrett sees uneven results flowing from recently announced price increases, which center on the 3.8% average

(Footnote continued on following page)

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> increase set by U.S. Steel. The decision by U.S. Steel to delay price increases on sheet and strip products until Oct. 1, he says, suggests increased pressure on profits of most other steel companies in the current quarter.
>
> Although the analyst is basing his current estimates for the six companies on the assumption that the 3.8% price boost can be realized over the rest of this year, he terms it a "shaky" assumption.
>
> "The profit outlook for the remainder of the year remains rather cloudy. With future pricing perhaps the greatest area of uncertainty," he says.
>
> "Cost increases and sharply reduced operating rates will clearly require some relief if the industry's near-term profit viability is to be maintained. The extent to which pressure from cut-rate imports and reduced demand will limit or prevent improved price realization cannot be gauged with any confidence."
>
> Mr. Starrett estimates that industry shipments this year will drop to 84 million tons.
>
> Although he believes industry volume could rebound 10% or more next year, he doesn't expect supplies to be tight.
>
> "Although cost-price relationships will be the ultimate determinant, it seems unlikely at this early date that industry profits will return to peak 1974 levels next year," he says.
>
> "In the interim, the odds appear to favor more bad news. In general, while quarterly dividend rates don't appear to be in jeopardy, the extra payments adopted by all but U.S. Steel in 1974 might be reduced or eliminated."
>
> Mr. Starrett's estimates of per-share net this year: U.S. Steel $8.50 vs. $11.52 in 1974; Bethlehem $5 vs. $7.85; Armco $4 vs. $6.71; Inland $5.50 vs. $7.96; National $3.50 vs. $9.44; and Republic $6 vs. $10.55. His U.S. Steel estimate includes 82 cents per share earned in the first quarter from sale of timberland.

Holman Reply Brief, at 9-10 n.

Appendix A

The question of the first amendment protections due a news report of a copyrighted research report is a provocative one. Conflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine. *E.g., Walt Disney Productions* v. *Air Pirates,* 345 F.Supp. 108, 115 (N.D.Cal. 1972); *McGraw-Hill, Inc.* v. *Worth Publishers, Inc.,* 335 F.Supp. 415, 422 (S.D.N.Y. 1971). Some day, legitimate in-depth news coverage of copyrighted, small-circulation articles dealing with areas of general concern may require courts to distinguish between the doctrine of fair use and "an emerging constitutional limitation on copyright contained in the first amendment." Nimmer, *Does Copyright Abridge The First Amendment Guarantees Of Free Speech And Press?* 17 U.C.L.A. L.Rev. 1180, 1200 (1970). *See* Patterson, *Private Copyright And Public Communication: Free Speech Endangered,* 28 Vanderbilt L.Rev. 1161 (1975). But, this is not the case.

[6-8] It is, of course, axiomatic that "news events" may not be copyrighted. *Time, Inc.* v. *Bernard Geis Associates,* 293 F.Supp. 130, 143 (S.D.N.Y. 1968). But in considering the copyright protections due a report of news events or factual developments, it is important to differentiate between the substance of the information contained in the report, *i.e.,* the event itself, and "the particular form or collocation of words in which the writer has communicated it." *International News Service* v. *Associated Press,* 248 U.S. 215, 234, 39 S.Ct. 68, 70, 63 L.Ed. 211 (1918); *see Chicago Record-Herald Co.* v. *Tribune Ass'n,* 275 F. 797 (7th Cir. 1921). What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material

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and marshals facts, his choice of words, and the emphasis he gives to particular developments. Thus, the essence of infringement lies not in taking a general theme or in coverage of the reports as events, but in appropriating the "particular expression through similarities of treatment, details, scenes, events and characterization." *Reyher* v. *Children's Television Workshop,* 533 F.2d 87, 91 (2d Cir. 1976). In a parallel manner, the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source.

Here, the appellants did not bother to distinguish between the events contained in the reports and the manner of expression used by the Wainwright analysts. Unlike traditional news coverage, moreover, the Transcript did not provide independent analysis or research; it did not solicit comments on the same topics from other financial analysts; and it did not include any criticism, praise, or other reactions by industry officials or investors. Rather, the Transcript appropriated almost verbatim the most creative and original aspects of the reports, the financial analyses and predictions, which represent a substantial investment of time, money and labor.[3] *See* Gorman,

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[3] The extent of the copying is illustrated by the following comparison of the Transcript's abstracts, on the left, and portions of the Wainwright reports, on the right:

> ". . . 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment."
>
> "And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's loss shrank last year."

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Copyright Protection For The Collection And Representation Of Facts, 76 Harv. L.Rev. 1569, 1578 (1963). *Cf.*

(Footnote continued from preceding page)

"His estimated earnings for 1976 is $3.76 per share compared with earnings of $3.24 per share in 1975."

"The first of the 'surprises' alluded to above that strengthens 1976 prospects is the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment." (p. 1)

"The second development likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year. . . ." (p. 2)

"Earnings (Years ending Dec. 31)

. . . Actual 1975 ..... $3.24 per share(b)

Estimated 1976 ..... $3.75 per share(c)

* * *

"(b) including LIFO profit of 20 [cents] per share and 12 [cents] per share benefit of change in pension funding assumptions.

". . . one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate sale of the Fiber Division."

". . . the company could wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings."

". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility."

(146a-147a).

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Note, *Beyond The Realm Of Copyright: Is There Legal Sanctuary For The Merchant of Ideas?*, 41 Brooklyn L. Rev. 284 (1974).

The copying by the Transcript is easily distinguishable from the reporting of the Wainwright research reports by other publications. The Wall Street Journal articles referred to by appellants, for example, were published a year apart. There apparently was no attempt to provide readers regularly with summaries of the Wainwright reports and there is no indication that the Wall Street Journal launched an advertising campaign portraying itself as a publisher of the same financial analyses available to large investors, but at a lower price. By contrast, the appellants' use of the Wainwright reports was blatantly self-serving with the obvious intent, if not the effect, of fulfilling the demand for the original work. *See Berlin* v. *E. C. Publications, Inc.,* 329 F.2d 541, 545 (2d Cir.), *cert. denied,* 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed. 2d 33 (1964). This was not legitimate coverage of a

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". . . one of the most hopeful developments at FMC in recent years was the decision reached by management late last year to attempt to negotiate sale of the Fiber Division. . . ." (p. 4)

". . . FMC would wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings." (p. 6)

". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, and that the major incremental financial cost to FMC will lie in the determination of what share of the *present* unreserved overrun is the company's responsibility." (p. 7)

news event; instead it was, and there is no other way to describe it, chiseling for personal profit.[4]

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[4] Section 107 of the revised Copyright Law, P.L. 94-553, effective January 1, 1978, provides that the fair use of a copyrighted work for such purposes as "news reporting" is not an infringement of the copyright. The factors to be considered in determining whether the use is a fair one include:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Significantly, the legislative history of the revised law suggests that the defense of fair use should be restricted when material is appropriated from a "newsletter" for profit-making purposes:

> During the consideration of the revision bill in the 94th Congress it was proposed that independent newsletters, as distinguished from house organs and publicity or advertising publications, be given separate treatment. It is argued that newsletters are particularly vulnerable to mass photocopying, and that most newsletters have fairly modest circulations. Whether the copying of portions of a newsletter is an act of infringement or a fair use will necessarily turn on the facts of the individual case. However, as a general principle, it seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals. The commercial nature of the user is a significant factor in such cases: Copying by a profit-making user of even a small portion of a newsletter may have a significant impact on the commercial market for the work.

H.R. No. 94-1476, 94th Cong. 2nd Sess. 73-74, *reprinted in* [1976] U.S. Code Cong. & Admin. News, p. 5687.

Thus, under Judge Lasker's well-reasoned fair use analysis, or, meeting the Transcript on its own ground, under a free speech theory, the appellants have failed to demonstrate that their use of the Wainwright reports either was reasonable or pursuant to legitimate news reporting that implicates first amendment interests.

Affirmed.

H. C. WAINWRIGHT & Co.,

Plaintiff,

v.

WALL STREET TRANSCRIPT CORPORATION and Richard A. Holman,

Defendants.

No. 76 Civ. 3053.

United States District Court,

S. D. New York.

Aug. 19, 1976.

Cahill, Gordon & Reindel, New York City, for plaintiff; Stephen A. Greene, Roy L. Regozin, Ira A. Finkelstein, Helene Fromm, New York City, of counsel.

Eaton, Van Winkle & Greenspoon, New York City, for defendants.

MEMORANDUM

Lasker, District Judge.

H. C. Wainwright & Co. is engaged in the securities business as a broker. As an important adjunct to its brokerage business, Wainwright has for nearly forty years provided financial research for its clients. The

roster of those it currently serves numbers more than 900 including most major banks, insurance companies, mutual funds, investment counselors, and pension funds in a variety of countries. 90% of Wainwright's revenues and even more of its profits are earned from the research which it retains a staff of 80 professionally trained persons.

Wainwright regularly furnishes its clients with detailed and analytical "Research Reports" relating to some 30 industrial areas and 275 industrial, financial, utility and railroad corporations which represent a "broad cross-section of the economy of the United States, and, as measured by capitalization, account for the bulk of the market value of a typical institutional equity portfolio."[1]

Wainwright copyrights each of its reports by registration with the Register of Copyrights, affixing the classic "copyright sign", its name and the year at the bottom of the first page of each report and adding the notice "All rights reserved. No portion of this report may be reproduced in any form without prior written consent." There is no doubt that if Wainwright's reports are copyrightable—a point which Wall Street Transcript Corporation questions—they have been copyrighted.

The Wall Street Transcript is published weekly. Among its features is the "Wall Street Roundup" which consists largely, if not exclusively, of abstracts of reports prepared by institutional and business researchers. It advertises itself to the financial world as a purveyor of institutional research reports in abstract form. The announcements appearing in the widely read and respected

[1] Affidavit of Robert L. Meyer, July 9, 1976.

Barron's for October 27, 1975 and July 5, 1976 are typical. They advise the reader that the Transcript will furnish him:

> "WHAT leading investment houses across the country are saying to their big institutional clients—the big banks, insurance companies, funds, and important foreign clients." (October 27, 1975) (Regozin Affidavit, Page 3)
>
> ". . . now you can read 1,000 pages of institutional research in 30 minutes! First thing each week, The Wall Street Transcript brings you a fast-reading, pinpointed account of heavyweight reports from the top institutional research firms.
>
> "Our Wall Street Roundup will save you hundreds of hours of reading; report to you the highlights of thousands of institutional-level research reports each year; and index every bit of it for you, immediately, for use whenever you want it. In addition, every account will give you full details as to who wrote the report, the date and the original length. . . ." (Regozin Affidavit, Page 2)

For several months[2] prior to the commencement of this suit, the Transcript has published a number of abstracts of Wainwright reports. These include the reports of FMC Corp., Overnite Transportation, Monsanto Company, Eastman Kodak, Polaroid Corporation and C.I.T. Financial Corporation. Promptly after learning of the

[2] It is not clear from the moving papers precisely when the Transcript first published abstracts of Wainwright's reports. The earliest date indicated is "May 1976". (Regozin Affidavit, Paragraph 5)

publications, Wainwright protested in writing to the Transcript that they violated Wainwright's copyrights. Counsel for the parties attempted responsibily but unsuccessfully to reach agreement as to their respective rights. This suit followed.

Wainwright claims that the publication of the Transcript constitutes actual or substantial copying of its reports in violation of 17 U.S.C. § 1 *et seq.,* as amended, (1970) and moves for a preliminary injunction restraining the Transcript from infringing Wainwright's copyrights. The Transcript argues that: 1) Plaintiff's research reports are not subject to copyright; 2) its abstracts furnish the public information which it has "a right to know", and that they are accordingly protected by the First Amendment; 3) Wainwright is not entitled to protection because by this suit it seeks to suppress "inside information" in violation of the rule established by such cases as *S.E.C.* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833 (2d Cir. 1968) and 446 F.2d 1301 (2d Cir. 1971), *cert. denied,* 404 U.S. 1005, 92 S.Ct. 561, 30 L.Ed.2d 558 (1972); and 4) under the doctrine of "fair use" the Transcript has the right to publish abstracts of Wainwright's reports. We find none of the Transcript's contentions to be sound and accordingly grant Wainwright's motion for preliminary relief.

I.

Citing such decisions as *Marvin Worth Productions* v. *Superior Films Corp.,* 319 F.Supp. 1269 (S.D.N.Y. 1970); *Norman* v. *Columbia Broadcasting System,* 333 F.Supp. 788 (S.D.N.Y. 1971) and *Dellar* v. *Samuel Goldwyn,* 150 F.2d 612 (2d Cir. 1945) the Transcript argues that:

> ". . . matter which lacks originality and [includes] facts as such are not copyrightable"

and adds

> "nor are plaintiff's conceptions, viewpoints or ideas embodied in its research report within the scope of copyright protection."

[1, 2] The difficulty with the Transcript's position is that the proposition of law which it states correctly does not apply to the facts of the case. Wainwright's reports, detailed excerpts of which appear below, clearly do not lack originality, and its original analyses and conclusions are without question entitled to copyright protection. The decisions on which the Transcript relies do not hold that such material may be freely copied, as the Transcript claims, but rather, as is explained in detail in part IV below, that a copyright does not grant its holder a monopoly of discussion of the underlying subject matter. Thus, for example, while an historian may not simply rewrite a copyrighted book, he is free to cover the same subject matter in a book growing out of his own independent research. The Transcript does not claim to have conducted any independent research in preparation of its abstracts. To the contrary, it blandly asserts the unsupportable proposition that ". . . independent work, if such be required, is the reading of the . . . Wainwright copyrighted report."[3] Such a theory, if validated, would make a shambles of the copyright law; copyright would dissolve upon the mere reading of the protected material, and protection would be a chimera. Neither the Constitution nor the statute contemplates such evanescent or worthless protection.

[3] Letter of Samuel M. Greenspoon, attorney for the Transcript, to the Court dated July 26, 1976.

[3, 4] Nor is there merit to the Transcript's subordinate arguments that Wainwright's reports do not meet the requirements of the statute because they are neither sold, nor works not reproduced for sale within the meaning of 17 U.S.C. § 12, or that they do not fall within "Class (a)" or 17 U.S.C. § 5 in which their certificates of registration classify them. The affidavit of Robert L. Meyer, a partner in Wainwright and its Director of Research, clearly establishes at Paragraphs 2-8 that furnishing the reports is part of the service for which Wainwright charges a cost to its clients. Moreover, the statute does not require a literal sale, but may be satisfied by a lease, loan or gift of the copyrighted materal. See, e.g., *Bartok* v. *Boosey & Hawkes, Inc.*, 523 F.2d 941, 945 (2d Cir. 1975). Even advertising handouts and illustrations in a catalogue are protected. *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239, 23 S.Ct. 298, 47 L.Ed. 460 (1903); *Lin-brook Builders Hardware* v. *Gertler*, 352 F.2d 298 (9th Cir. 1965).

[5] There is no greater merit to the claim that the reports are not "books" within the meaning of subdivision (a) of 17 U.S.C. § 5. If they are not—and they appear to be in every respect except the most literal—they are "composite works" or "other compilations". Even greeting cards are registrable under Class (a), *Roth Greeting Cards* v. *United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970), as are machine-scorable answer sheets to tests. *Harcourt, Brace & World, Inc.* v. *Graphic Controls Corp.*, 329 F.Supp. 517 (S.D.N.Y. 1971). Moreover, the copyright office's grants of certificates of registration to the

plaintiff indicate that it construes the statute to cover the reports.

II.

[6] The Transcript asserts that it is a newspaper and that in furnishing its readers abstracts of business and industrial reports it is merely giving them the news. More particularly, it claims that the First Amendment, especially as its reach has been construed in the recent decisions of the Supreme Court in *Buckley* v. *Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) and *Virgina State Board of Pharmacy* v. *Virginia Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) assures the public's "right to know" the information contained in the Wainwright reports.

[7] The Transcript's ingenious designation of the reports as news is faulty. While the fact of Wainwright's issuing a report on a particular company or industry, and perhaps whether it was favorable or unfavorable, bullish or bearish, may be news, the precise contents of the report are not news—at least if the term is meant to indicate that the material, as is the case of true "news," is in the public domain. The original analytical contents, the style, impressions, estimates, assessments and appraisals of the reports are protected, as is the particular expression of the facts. The public has a right to know the facts, but does not have a right to know them in the particular form in which an author assembles and expresses them.

As to the Transcript's claim that the First Amendment protects the publication of its abstracts, one could dispose of the argument as Judge Croake did in *McGraw-Hill* v. *Worth Publishers Inc.,* 335 F.Supp. 415, 422 (S.D.N.Y. 1971) by saying:

> "Defendants' First Amendment argument, in so far as it is distinguishable from their claim of fair use, can be dismissed as flying in the face of established law. See U.S.Const. Art. 1, § 8; 17 U.S.C. §§ 1, *et seq.,* 112."

Judge Zampano put it nearly as concisely in *Robert Stigwood Group Ltd.* v. *O'Reilly,* 346 F.Supp. 376, 383 (D.Conn.1972) *aff'd,* No. 72-1826 (2d Cir., May 30, 1973):

> "The short answer to the defendants' absolutist approach to the meaning of the First Amendment is that it is simply not the law. Were the First Amendment to be applied literally, our statutes pertaining to perjury, obscenity, mail fraud, among many other, would constitutionally fall."

[8] A further comment is in order. The tension between the First Amendment and the copyright statute which the Transcript professes to discern in such cases as this does not exist. It does not exist because the doctrine of fair use, discussed below, has been precisely contoured by the courts to assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation.

III.

[9] Relying solely on the decisions in *S.E.C.* v. *Texas Gulf Sulphur Co., supra,* the Transcript contends that "it is a violation of law to utilize insider information in such a way that the general public is excluded therefrom and only plaintiff's customers receive the benefits therefrom."

Appendix A

Even if this characterization of the *Texas Gulf* rule, a case relating only to the purchase of securities, were not over generalized, it would not be applicable to the case at hand.

In the first place nothing in the record supports the unfounded claim that inside information is used in preparation of or is included in the reports. The allegation of such use springs full blown from, and only from, the Transcript's memorandum in opposition, and is categorically denied in Wainwright's reply memorandum with references to Meyer's affidavit at Paragraph 10, which in turn refers to various reports which are exhibits to the complaint. Nothing contained in them appears to support the Transcript's claim and the Transcript has filed no affidavit on the motion, nor furnished any material controverting Wainwright's categorical denial of the use of inside information.

Furthermore, there is serious doubt whether, under the holding in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975) defendants have standing to assert the defense of the violation of the securities laws which they claim.

IV.

> "'Fair use' is a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner . . ." Ball, Copyright & Literary Property 260 (1944).

The Transcript's major position is anchored in the theory of fair use.

Appendix A

The leading case on the subject in this Circuit is *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966). There Judge Moore explained at page 307 that:

> "The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, 'To Promote the Progress of Science and the Useful Arts' U.S.Const. Art. 1 § 8. (Citations omitted) To serve that purpose, 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry' *Berlin* v. *E. C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir. 1964)."

[10] The classic instances in which courts have permitted authors to use excerpts from a copyrighted work without the consent of the copyright owner are those of literary criticism and parody of the copyrighted work, history and biography.

> "The cases and commentaries attempting to define the quicksilver content of 'fair use,' although varying and overlapping in their definitions, appear to agree that at least four tests are appropriate to determine whether the doctrine applies: (1) Was there a substantive taking, qualitatively or quantitatively? (2) If there was such a taking, did the taking materially reduce the demand for the original copyrighted property? (3) . . . [D]oes the distribution of the material serve the public interest in the free dissemination of information? And (4) does

the preparation of the material require the use of prior materials dealing with the same subject matter." *Marvin Worth Productions* v. *Superior Films Corp.*, 319 F.Supp. 1269, 1275 (S.D.N.Y. 1970).[4]

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[4] Similar factors, declared to be a codification of existing law are included in § 107 of the S. 1361, The General Revision of the Copyright Law pending before Congress. They are:

1) the purpose and character of the use;

2) the nature of the copyrighted work;

Abstract

". . . 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment."

3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4) the effect of the use upon the potential market for or value of the copyrighted work.

"And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year."

* * *

". . . one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate a sale of the Fiber Division."

". . . the company would wind up with possibly $100 million, plus a tax writeoff and a sizeable one-time charge against earnings."

". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the

(Footnote continued on following page)

(Footnote continued from preceding page)

major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility."

* * *

"Trantum estimates that Overnight Transportation will earn $3 a share this year, compared with $2.03 in 1975 and $2.78 in 1974."

* * *

"Productivity gains are being realized, he believes, and a favorable earnings trend should be maintained this year, with additional gains in 1977 as a result of recent additions to route authority and plans for developing new business between Ohio and the Southeast."

"As for the longer term, Trantum says management must take several steps to improve its uneven earnings performance since 1971. He says it must expand its operating authority to cut its dependence on the Southeast, put greater stress on sales and refine and tighten its system of revenue and expense controls."

"Trantum says progress is apparently taking place in all three areas, but he says it's too early to define the effects of the company's actions on long-term prospects."

Special Reports

"The first of the 'surpris s' alluded to above that strengthen 1976 prospects is the magnitude of the increase in industrial and agricultural chemcial earnings in last year's recissionary environment." (p. 1)

"The second development likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year. . . ." (p. 2)

* * *

(Footnote continued on following page)

Appendix A

(Footnote continued from preceding page)

". . . one of the most hopeful developments at FMC in recent years was the decision reached by management late last year to attempt to negotiate sale of the Fiber Division. . . . (p. 4)

". . . FMC would wind up with possibly $100 million, plus a tax writeoff and a sizeable one-time charge against earnings." (p. 6)

". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, and that the major incremental financial cost to FMC will lie in the determination of what share of the *present* unreserved overrun is the company's responsibility." (p. 7)

* * *

"Earnings (Years ending Dec. 31)

Actual 1974 .....$2.78 per share

Actual 1975 .....$2.03 per share

Estimated 1976 .....$3.00 per share (p. 1)

* * *

"Productivity gains are finally being realized. . . . Furthermore, with the recent additions of route authority and the planned development of new business between Ohio and the Southeast, the carrier should be positioned to extend the favorable earnings trend into 1977." (p. 1)

"Before Overnite can be expected to significantly improve on uneven earnings performance since 1971, this analyst believes it necessary for management to take several steps: (1) expand operating authority to reduce dependence on the Southeast, (2) place greater emphasis on sales, and (3) refine and tighten the company's system of revenue and expense controls." (p. 1)

(Footnote continued on following page)

Appendix A

[11] Judged by these criteria the Transcript's abstracts do not constitute a fair use of Wainwright's reports. The takings have been substantial in quality, and absolutely, if not relatively substantial in quantity. Compelled by their very raison d'etre to present the *essence* of the Wainwright reports the Transcript abstracts suck the marrow from the bone of Wainwright's work without even the assertion of any independent research by the Transcript. There is, by the nature of an abstract, a special concentration on analyses, projections and conclusions: the elements of greatest value. Moreover, while the takings are not great in relation to the length of the reports they are nevertheless absolutely substantial in quantity.

The following examples are typical of the takings, and illustrate particularly well the remarkable extent of copying:

There is every reason to believe that the publication of the extracts may materially reduce the demand for Wainwright's services. Furnishing its reports to its clients is an especially valued feature which distinguishes Wainwright's services from other brokers'. The Transcript's infringements impair the value of Wainwright's copyrighted material by making its contents available to other brokerage houses with which Wainwright competes. Moreover the infringements impair Wainwright's ability to publish its own abstracts or to authorize others to do so.

(Footnote continued from preceding page)

"While progress is apparently being made in all three areas, it is still too early to precisely define the effects of these actions on the long-term outlook." (p. 1)

(Regozin Affidavit, Pages 8-11)

Nor is the distribution of the abstracts necessary to serve the public interest in the free dissemination of information. There is no question here of denial of public access. The Transcript is free to prepare and issue its own reports based on its own research and without use of copyrighted material. However, "[t]he second . . . publisher cannot bodily appropriate the research of its predecessor." *Rosemont Enterprises Inc.* v. *Random House Inc., supra*, at 310; and "No public need appears which would justify defendants' saving themselves time and trouble at the expense of plaintiffs' copyright." *Marvin Worth Productions* v. *Superior Films Corp., supra,* at 1275.

Finally, while the preparation of the Transcript's material may "require the use of prior materials dealing with the same subject," such a need frees the Transcript to get such prior materials from the source only—that is, to do its own research—not to lift passages wholesale from Wainwright's independent product under the guise of merely repeating facts or business terms or furnishing news to the public.

In sum, the Transcript's copyings are not protected as fair use of the material.

[12] The true nature of the Transcript's abstracts is that of a derivative work. Derivative works are an approved genre under 17 U.S.C. § 7, but may be copyrighted or published only with the consent of the publisher of the underlying work, which of course has not been given here.

V.

Wainwright has without question made a prima facie showing of infringement of its copyright. The defenses

asserted by the Transcript have not been established. In the circumstances Wainwright is entitled to a preliminary injunction to protect its copyrighted property and to shield it from the unmeasurable consequential damage to its brokerage business which could flow from making the contents of its research reports known without cost to competitors, potential clients and the public.

This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law.

The motion for preliminary injunction is granted and a decree is being filed concurrently with the filing of this Memorandum Opinion.

Appendix A

Order on Petition for Rehearing

UNITED STATES DISTRICT COURT
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of August, one thousand nine hundred and seventy-seven

Present:

HON. HAROLD R. MEDINA
HON. JAMES L. OAKES
Circuit Judges
HON. JACOB MISHLER
District Judge

76-7468

WAINWRIGHT SECURITIES, INC.,
Plaintiff-Appellee,
v.
WALL STREET TRANSCRIPT CORP. and RICHARD A. HOLMAN,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendants-appellants

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Appendix A

Superseding Preliminary Injunction, Dated October 12, 1976

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

The Court entered a Preliminary Injunction in this action on August 20, 1976 and defendants filed motions for reargument and for modification of the terms of such Preliminary Injunction on August 30, 1976. The Court having considered the aforesaid motions, the affidavits of Richard A. Holman and Myron Kandel and the memorandum of law submitted by defendants in support of their motion for modification and their motion for reargument, respectively, and the affidavits of Robert L. Meyer and Roy L. Regozin and the memorandum of law submitted by plaintiff in response thereto and having heard counsel for the defendants and counsel for the plaintiff concerning the manner in which the Preliminary Injunction should be modified, and it appearing to the Court after due deliberation that it would be appropriate to modify and clarify in certain respects the provisions set forth in the Preliminary Injunction previously entered herein and to restate its terms in their entirety, and it still appearing to the Court after due deliberation that plaintiff has established a prima facie case that defendants have infringed plaintiff's copyrights in its Research Reports and that there is a substantial risk that defendants unless restrained will continue to do so during the pendency of this action, to the irreparable injury of the plaintiff, and that the issuance of this order will not irreparably injure defendants, and the Court having determined that there is no need to modify in any respect its findings of fact and conclusions of law set forth in its Memorandum Opinion previously filed herein, it is

ORDERED, that defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them or on their behalf, be and they hereby are restrained and enjoined, pending the determination of this action, from:

(a) publishing, selling, marketing or otherwise disposing of any copies of the abstracts of plaintiff's copyrighted Research Reports set forth on pages 43,669, 43,689, 43,789, 43,845 and 44,163 of the May 10, May 17, May 24, May 31 and July 5, 1976 issues of *The Wall Street Transcript,* respectively; and

(b) publishing, selling, marketing or otherwise disposing of any copies of any other abstracts of any of plaintiff's copyrighted Research Reports presented in the format of the feature "Wall Street Roundup" of *The Wall Street Transcript*; and it is further

ORDERED, that defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them or on their behalf, be and they hereby are restrained and enjoined, pending the determination of this action, from selling, circulating or otherwise disposing of any copies of the May 10, May 17, May 24, May 31 and July 5, 1976 issues of *The Wall Street Transcript* unless, prior to any such distribution of any such copy of any such issue, the abstract of plaintiff's copyrighted Research Report contained therein on page 43,669, 43,689, 43,789, 43,845 and 44,163 thereof, respectively, is inked out or otherwise rendered illegible in its entirety, and defendants shall provide written instructions to this effect to their personnel having access to copies of such issues and

shall post copies of such instructions in prominent places in the area or areas in which copies of such issues are stored by or on behalf of defendants and in the area or areas in which copies of back issues of *The Wall Street Transcript* are prepared for delivery or mailing by or on behalf of defendants; and it is further

ORDERED, that plaintiff shall file within five days from the date of entry hereof and keep in full force and effect a bond or bonds in the total sum of $5,000, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained hereby; and it is further

ORDERED, that upon entry of this Preliminary Injunction, the Preliminary Injunction entered herein on August 20, 1976 shall have no further force or effect.

Dated: New York, New York
October 12, 1976

s/ MORRIS E. LASKER
U. S. D. J.

APPENDIX B

United States Constitution

Amendment I

82nd Congress Senate Document 170, p. 40

Congess shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, Section 8, Clause 8

The Congress shall have Power . . .

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

90 Stat 2546 (1976)
17 U.S.C. §107

"Notwithstanding the provisions of Section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"(2) the nature of the copyrighted work;

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work."

70 Stat 63 (1956)
17 U.S.C. §13

"After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section 16 of this title; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if

the work belongs to a class specified in subsections (g), (h), (i) or (k) of section 5 of this title, and if the Register of Copyrights determines that it is impracticable to deposit copies because of their size, weight, fragility, or monetary value he may permit the deposit of photographs or other identifying reproductions in lieu of copies of the work as published under such rules and regulations as he may prescribe with the approval of the Librarian of Congress; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section 12 of this title, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with."

APPENDIX C

Excerpt from the Wall Street Journal, June 30, 1977
Page 35

"Analyst's Lowered Forecast of Chrysler Profit Widens Opinion Gap Over Outlook for Firm
By Charles J. Elia"

• • •

"Yesterday, Wainwright Securities weighed in with a 1978 forecast that is probably the lowest on the Street. It was Wainwright's second report to clients this week on Chrysler. On Monday, analyst Harvey E. Heinbach reduced his second quarter and full-year 1977 estimates, placing them among the Street's lowest, citing reasons that went beyond strike effects.

Mr. Heinbach is estimtting second quarter net at $1.50 to $1.75 a share, which he considers "rather disappointing," and full1year 1977 net at $5.25, down from an earlier estimate of $5.50.

The Wainwright analyst's 1978 estimate, made in a capsule report to the firm's clients yesterday, is $3 a share.

Excluding extraordinary tax credits, Chrysler earned $5.45 a share last year, compared with a deficit equal to $3.67 a share in 1975. A few other analysts' 1977 estimates are in the range Mr. Heinbach is using, but others are closer to the $5.90-$6 area.

Mr. Heinbach's 1978 estimate widens an already broad gap among Street analysts, who are currently looking for earnings ranging anywhere from $4.25 a share to $7 or more.

• • •

Appendix C

Wainwright's Mr. Heinbach thinks the company "will be hard-pressed just to match the third quarter 1976 profits" because he expects world-wide production to decline 5% to 6% from a year earlier.

He also is reluctant to accept Chrysler's mid-June assessment that strikes penalized the current quarter's earnings 50 to 55 cents a share. "Our own calculations suggest that strikes may have cost close to 25 cents a share, indicating that earnings would be down even without the strikes," he says.

"Chrysler's real problem is loss of market share in the domestic auto area," says Mr. Heinbach. He expects Chrysler to register only "minimal" volume improvement this year, "meaning that cost pressures will intensify relative to 1976, when major volume and productivity gains were realized," he says.

"Based on a relatively pessimistic economic overview, calling for real gross national product growth of 3%, we look for 1978 auto industry sales to slip 4% to 10.7 million units," Mr. Heinbach says.

"Thus, while it's expected that Chrysler's market share will show some recovery on the strength of its initial entry into the subcompact car market, world-wide factory sales may show no progress at all. Assuming intensified cost pressures and no product mix benefits, 1978 earnings are projected to fall off substantially."

Beyond 1978, the Wainwright analyst says his cash-flow projections for the company indicate to him that Chrysler will have to hold its capital and tooling expenditures per unit "well below" those of Ford and General Motors, confronting it with a competitive disadvantage. . . ."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-680
(A-492)

WALL STREET TRANSCRIPT CORPORATION and
RICHARD A. HOLMAN,

Petitioners,

—v.—

WAINWRIGHT SECURITIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITIONERS' REPLY BRIEF

RICHARD J. BARNES
220 East 42nd Street
New York, New York 10017
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Of Counsel:

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New York, New York 10017

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THE WALL STREET JOURNAL, Wednesday,
December 28, 1977, at 10, Col. 1-2.

Poll Says Individual Shareholders Resent Companies as Well as Distrust Wall Street

By GENE G. MARCIAL
Staff Reporter of THE WALL STREET JOURNAL

NEW YORK—If the small investor has been staying away from the stock market over the years, part of the reason is his resentment against the corporation as much as his distrust of Wall Street.

The reason behind such antagonism seems simple enough: The investor and the corporation haven't been communicating.

That's part of what comes up, at least, in a recent survey of individual investors and corporate executives who expressed their feelings about the problem. The survey was conducted jointly by Georgeson & Co. and Lind Brothers. Georgeson is a New York-based investor-relations firm providing long-range information programs on behalf of corporate clients, and Lind Brothers, also based in New York, is a major producer of annual reports.

"Individual investors have latent loyalty toward corporations they invest in, but they have grown wary and weary of the apparent lack of interest in their own plight from all sectors," says Winthrop C. Neilson, a partner at Georgeson.

Reluctant to Court

On the other hand, corporations, although vitally interested in having the individual as an investor, "seem reluctant to court him through more creative concepts or consistent communications, apparently because they are perplexed on where to begin and are leery of investors' reactions," says Mr. Neilson.

The survey, say Mr. Neilson and George Lind, president of Lind Brothers, is the first about the collective attitudes of corporate officers toward individual investors. The survey also queried stockholders about the attitudes toward the corporation. Responses were provided by 504 individual investors and 526 corporate executives.

Mr. Neilson says three basic characteristics are apparent in the average individual stockholder. He exhibits "deep-rooted distrust for the workings of the stock market, a strong sense of practicality and an untapped loyalty towards the companies in which he invests."

The survey shows how disheartened and puzzled the small investor is, says Mr. Neilson, resulting in fewer individual participants in the stock market. Apparently, "those who remain search for guidance and find little," he adds. Many of them believe they are handicapped by a lack of access to timely investment information, says Mr. Neilson.

Individual Stockholders Down

New York Stock Exchange figures show that only about 25 million individuals own stocks, down from about 31 million in 1970. Last year, financial institutions and intermediaries accounted for 70.3% of the value of all shares traded on the Big Board and individuals accounted for only 29.7%.

The Georgeson-Lind survey discloses that individual stockholders blame market fluctuations or violent swings on "the disruptive" influence of institutions, which they believe favor only a few corporations. The investors also think the corporations not only favor the institutions as investors but also seek them out by offering preferential treatment.

"A common investor complaint is that the financial community is receiving inside information, presumably to act in its own interests before passing the data on to clients," says Mr. Neilson. The brokerage community, he adds, is blamed for failing to provide any special services to assist the small investor. "Poor service and high commission rates are frequently cited" by the investors, Mr. Neilson says.

Investors, the survey shows, believe the corporations' efforts to disseminate information are directed more toward the financial community. Only 6% of the individuals surveyed feel corporations provide them with better information than professional brokers. Some survey respondents believe executives earn too much money, with bonus payments cited often.

However, the individual investors appear worried about the antibusiness sentiment they believe is prevalent in the nation, and they indicate it's one cause of the stock market's poor behavior. Investors believe business should do a better job of counteracting the trend.

The survey also touched on investor sentiment against the government for restrictions on business while, they say, other segments of the economy seem to be favored by legislators and regulatory agencies. The investors cite "unfair" taxes and lack of Securities and Exchange Commission interest in the individual investor's plight. More than 90% believe they don't have any friends in Washington, and even the Federal Reserve Board is criticized by several stockholders.

Mr. Neilson says the investors showed their "practicality" by recognizing in their responses that "objective and timely information" is the lifeblood of prudent investing. The investors believe the financial press is the quickest source for this information, rather than brokers or corporations.

The corporations, responding to this question, assert that news stories are often superficial, prejudiced or incomplete, although they say that time and space restrictions, in many instances, could be at fault. The individual investors, however, believe they aren't getting the information they need elsewhere and turn to the press, which they believe is the most unbiased and immediate source of information. Furthermore, the investors perceive the media as having no special interests to satisfy.

Shareholders believe the information they receive from corporations isn't timely and is often difficult to understand. By default, the press fills that gap, the shareholders say.

Excerpts From "Public Policy for American Capital Markets"

Issued by the Treasury Dept., February 1974. Prepared by James H. Lorie, Professor of Business Administration, University of Chicago.

"I. Introduction

American capital markets are of great importance to the vitality of the American economy. Efficient and equitable markets encourage the flow of individual and institutional savings to American corporations, thereby reducing their cost of capital and providing profitable opportunities for investors. Some informed observers feel that the relative vitality of the American economy throughout its history has been fostered to an important degree by our system of capital markets.

. . .

The characteristics of the American capital markets which have produced these results are numerous, but among the more important are the fact that investors feel that they can buy at the lowest available price and sell at the highest available and the fact that the generation and flow of relevant information is relatively rapid, accurate, and complete.

Recently, according to many observers, including prominent members of both houses of Congress, American capital markets have been in disarray. Evidence of this disarray consists of reduced public confidence in American markets, as indicated by the first decline in many years in the number of Americans investing directly in common stocks,[1] the failure of many brokerage firms, and the fragmentation of markets. The loss of public confidence in our securities markets can be directly attributed to the relatively low

returns on equity investments in recent years and to the feeling that institutions have an advantage over individual investors." (Page 1).

. . .

"II. Objectives of Public Policy

The general objective of public policy is to have markets that operate fairly and efficiently. Fairness and efficiency lead to confidence on the part of the investing public that returns will be reasonably related to risks, that the institutions through which they deal have financial integrity, and that the individual investor is not at a serious disadvantage compared with the institutional investor." (Page 3).

. . .

"Public policy must strive to create conditions which result in the equitable treatment of individual investors as compared with institutional investors." (Page 5).

. . .

"IV. Summary and Conclusions

. . . The overriding objective of public policy is to make our capital markets function more equitably and efficiently so as to reduce the cost of capital for American enterprise and increase the likelihood that capital will be channeled into its most productive uses. This objective can be fostered by insuring that our securities markets operate to achieve maximum efficiency in determining prices of securities and in effecting the transfer of ownership of securities. Moreover, attainment of this public policy objective requires the achievement of equity in relationships between investors and their financial agents, as well as between individual investors and institutional investors." (Page 19).

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REMARKS BY THE
SECRETARY OF THE TREASURY
THE HONORABLE W. MICHAEL BLUMENTHAL
BEFORE
THE BOND CLUB OF NEW YORK, INCORPORATED
NOVEMBER 21, 1977

It's good to be here today -- to discuss a problem that concerns us greatly in Washington -- the weak condition of our equities markets.

We're not dealing here with merely a Wall Street problem. The ability of American companies to raise equity capital -- to expand without adding to debt burdens -- is a key requirement for a sustained, non-inflationary economic expansion. The health of the economy -- and our economic future -- depends on it.

The issue is how to provide more equity capital. For it is equity capital which will help generate new products, new plant and equipment, new jobs and, ultimately, a better quality of life for all Americans.

Ironically, the weakness of equity markets comes at a time when our capital markets, as a whole, are the envy of the world. In 1976, they provided a total of $236.5 billion in net new long-term funds for public and private purposes -- compared to $142 billion raised in 1972.

This size is unmatched by any other country, not to mention the depth, flexibility and openness of our capital markets. No other country can raise and allocate large amounts of capital with less government interference. And no other country can direct capital more effectively to where it is needed.

Indeed, the other major segments of our capital markets -- for government securities, corporate bonds, and mortgage credit -- are relatively healthy and performing well.

During 1977, for example, the Federal Government expects to issue more than $50 billion of securities, excluding rollovers. State and local governments will increase their outstanding long-term debt by $24 billion. In the case of municipal issuers, that represents a 28 percent increase over 1976.

The corporate bond markets have provided $30 billion in new funds through long-term debt securities this year. At the same time interest rates in this sector remained nearly flat. The rates of AA-rated industrials were 7.97 percent at the beginning of this year, and are only slightly higher now at 8.05 percent.

We find the same impressive performance in the mortgage markets which have financed near record levels of housing starts -- a key to our economic expansion. Despite this rapid growth, mortgage rates have remained stable, and funds have been plentiful.

Yet while these segments of our capital markets -- primarily involving debt securities -- have done relatively well, our equity markets have been languishing.

The Dow Jones Industrial Average has dropped nearly 200 points this year, to about the same level it was in 1964 -- without adjusting for inflation. This represents a dramatic erosion of the equity values of recent years.

With that erosion in values, it is small wonder that individual investors have left the market in droves. The number of individual shareholders dropped from 31 million in 1970 to less than 25 million recently.

Many individuals have found other investments with better safety of principal and after-tax returns -- for example, corporate bonds -- and an increasing amount of individual savings is finding its way into pension funds and other institutions. Probably adding to this disenchantment is a feeling by individuals that they cannot compete with institutional investors.

Moreover, not only individuals have shifted away from common stocks. Private pension funds, for example, with now over $100 billion in common stocks, have been placing a larger share of new investment in fixed-income securities. Common stocks held by pension funds have declined from 70.8 percent of their total assets in 1972 to 64.6 percent in 1976.

This is a serious development, because pension funds and other institutional investors have become the mainstays of the equity markets. In 1976, institutions accounted for 70 percent of the value of all New York Stock Exchange public trading.

These developments in the equity markets are having a profound and worrisome effect on new issues.

The amount of public offerings of newly-issued equity securities has fallen dramatically since the late 1960's. From 1968 through 1972, industrial firms raised an annual average of $7.4 billion in common stock offerings. Since 1973, such common stock offerings have averaged only $2.6 billion per year.

Only the higher quality, well-capitalized companies have enjoyed access to the equity markets in recent years. The problem is even more serious for companies seeking to sell equity to the public for the first time. During the first six months of 1977, initial common stock offerings by these companies totaled only $230 million, compared to $3.3 billion in 1972.

The result has been a dramatic -- and disturbing -- rise in the percentage of debt in the capital structure of American manufacturers -- from 51 percent in 1958 to over 86 percent in 1976.

This means that many companies cannot raise additional debt unless their equity base expands. If they are mature and blessed with adequate cash flow, they can expand their equity with retained earnings. But for younger, growing firms that need expansion capital so badly, the unavailability of equity sets in motion a vicious cycle:

Without new equity capital they cannot grow -- without growth they cannot increase their earnings -- and without earnings they cannot raise new debt or external equity.

Data from the SEC show this situation starkly. Registered securities offerings by smaller companies -- those with assets of less than $5 million -- have dropped from a high of 698 in a single year, 1969, to only 41 in the three years of 1974 through 1976.

If the markets do not have new capital for these smaller companies, where can they turn? They will fail, or grow too slowly, or turn to larger companies to be acquired.

That kind of pressure for more concentration is not, in my view, a healthy trend. It enhances the danger that we are stifling the kind of innovation and new development which smaller enterprises typically engender.

This risk is a severe drag on American technological advancement, on productivity and competitiveness. A significant number of new products and other technological advances are made by individual inventors or small businesses -- enough so that restricting their flow of capital could foreclose important breakthroughs that lie ahead. Among these companies starved for capital today could be another Xerox, Polaroid or IBM.

So the problems and possible consequences of the weak condition of the equity markets are serious and merit the immediate attention of this Administration. And as we look at the problem, three underlying causes appear paramount.

The first -- and most important -- is inflation. The investment community recognizes that inflation breeds recession

-- that the reaction of business to prospects of accelerating inflation is to limit expansion and to curtail outlays, rather than trying to beat the price rise. We all have learned that inflation is not good for stock prices.

The second is low profits. The investment community has not been deceived by the reports of soaring profits. We have all long since learned that profits reported by conventional methods disregard the true costs of replacing the capital and inventories used in the conduct of business.

When earnings are adjusted for inflation, they show that profits have not soared. Indeed, they have not even kept pace with the growth of real GNP. Since the mid 1960's, real GNP has grown by over a third, while profits adjusted for inflation have risen by only a fifth.

A third cause has been the economic impact of the quintupling of the price of oil since 1973. This has adversely affected economic growth, inflation, unemployment rates and corporate profits.

There are other negative factors affecting our equity markets, as well. One of them -- and its impact is hard to gauge -- is the strain on the securities industry itself. The industry has been affected recently by some fundamental changes, particularly the growing institutionalization of the markets and the elimination of fixed brokerage commissions in May, 1975.

Because of these economic and regulatory changes, this industry has faced some painful adjustments. Institutional brokerage, at one time a financial mainstay, has become increasingly unprofitable. The industry has responded creatively, developing new products and new profit centers, such as options.

But those new endeavors carry their own regulatory and financial problems. This is a capital intensive industry, and those who do not have access to capital are not surviving. Not all have that access, and events in recent years have not encouraged new entrants. The number of NYSE member firms doing business with the public fell from 476 at the beginning of 1973, to 371 at the end of June of this year.

Related to the problem of the declining number of individual investors, the number of full-time registered representatives of New York Stock Exchange member firms decreased from 40,000 in 1972 to 36,000 in 1976. As the industry contracts, its efforts to attract new investors and to hold old ones also contract.

Uncertainty about the outcome of the SEC proceeding on Rule 390 may also be having an important effect. Some firms, those

that believe off-board trading is likely, are moving to acquire other firms with retail-order flow to improve their competitiveness. Others, uncertain of the effect on them of possible changes, are becoming more conservative about committing their capital -- or are seeking mergers with other firms.

The SEC has done a fine job in maintaining public confidence in the integrity of our markets. I have discussed the Rule 390 proceeding with Chairman Williams, and I am confident that the Commission will deal responsibly with this complex problem. The Treasury has already stressed to the Commission the importance of gradual changes in this area to minimize uncertainty and the danger of disruption.

I am certain that the Commission will not ignore the obvious risks of removal of restrictions on off-board trading before appropriate modifications to the present system are in place. I am also gratified that the leaders of the securities industry are already taking steps toward the development of an effective national market system as mandated by the 1975 amendments to the securities laws.

There are other concerns that no doubt have contributed to the weakness in our equity markets, but these would fade in importance once we begin to rebuild public and business confidence in our future economic performance.

If the future is perceived as a continuation of slow growth, high unemployment, and high inflation in the years ahead, the equity markets will continue to languish. If, however, the future promises improvements, the markets can and will recover.

Providing those improvements -- improvements that will lift all sectors of our economy to higher ground -- is the central task of this Administration's economic policies.

I am here to tell you today that we are aware of this task, and that we intend to carry it out in the months ahead. The job will not be easy. As Mayor LaGuardia used to say, it calls for "patience and fortitude."

Basic, long-term predictable and consistent policies will be needed. The emphasis, above all, must and will be on the private sector, on the market mechanism, and on reliance on the genius of the free enterprise system.

Unemployment, inflation, lagging investment and productivity, low profits, a languishing stock market -- all these cannot be solved by massive government programs, by spending our way out of deep troughs, or by clamping down on private businesses with new restrictions or edicts. So we will do our job and rely on American industry and on all of you here to do yours.

The problems will begin to be solved only when business executives, singly and collectively, decide that the best course toward profitability is through expansion. Then the building blocks of investment and risk-taking decisions -- decisions that take place tens of thousands of times every day in executive offices throughout the country -- begin to add up to a solid structure of new business activity.

That's a basic reality. And that's why we will rely on a steady, prudent set of policies for lasting economic results, fully aware that the really big problems take time to solve.

The essential first step is to spell out in full detail a cogent, comprehensive economic strategy -- where the sum of our policies promotes a sustained, noninflationary expansion.

As the energy plan and Social Security bills emerge from Congress, and we make final tax and budget decisions in January, the shape of our economic policy for the years ahead will be clear.

The fundamental element in our strategy is the private sector. Four out of five jobs in America are private jobs. While government can provide temporary work for the disadvantaged and for millions of new job-seekers entering the labor force each year, the real opportunity for lasting, meaningful jobs is in the private sector.

For the jobs to be there requires investment and risk capital -- much more than is available today for American business.

We must expect to provide greater incentives for investment and business risk-taking, principally by adjusting our tax structure.

The forthcoming tax proposals will contain incentives for capital formation, both for corporations and individuals. We fully understand the important role that preferential tax rates for capital gains have played in encouraging capital formation -- especially for venture capital and new businesses. We will, of course, take this into account in designing reforms to reduce or eliminate unjustified tax preferences.

The tax proposals will also take into account the ultimate shape of the energy program and the Social Security tax increases already scheduled and those now under consideration in the Congress, to ensure that these measures do not amount to a drag on the economy.

We must scale down the increasing bite that Federal income taxes take from the incomes of American workers. The average

share is now 13 percent and rising, as inflation pushes incomes into higher marginal tax rates. It had traditionally been 10 to 12 percent, and we should aim for a return to that level.

We will also continue our fight against inflation, building on the success made this year in moderating price increases. That ties in closely with an economic expansion fueled by greater productivity and disciplined public spending.

For example, we must control Federal spending to allow the budget to move into balance as unemployment and growth reach acceptable levels. Federal deficits are neither necessary nor desirable in an economy making full use of its resources.

As a rule of thumb, we should not allow the percentage of GNP by Federal spending to exceed 21 percent in the long run. That's about where it was over the past decade, but it has risen in recent years.

Finally, this Administration recognizes that it is important to devote more attention to our capital markets as such. In the Treasury, we have taken steps to do just that, including the creation of a new Deputy Assistant Secretary whose functions are concentrated in capital markets problems.

For too long, capital market questions have been viewed principally through the eyes of regulators. We are trying to look at all parts of our capital markets in relation to each other so that the Administration can help ensure the proper functioning of this vital part of our economy.

What is needed, then, is for all of us to work together. Let us not forget that ours is the strongest and the most productive economy in the world.

With sound government policies, with a confident business sector, and with the strong and innovative capital markets which you represent, the future is indeed bright.

I hope that you will all give us the benefit of your experience and judgment, so that together we can transform this bright promise into the reality of a better future for all of us.

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H.C. WAINWRIGHT & CO.
Established 1908

SPECIAL REPORT

EARNINGS ESTIMATE REVISION
HERBICIDE SITUATION

April 28, 1976 — **MONSANTO COMPANY (MTC)**

Earnings (Years ending Dec. 31) (a)			
Actual 1974	$ 9.25 per share	Recent price	92
Actual 1975	8.63 per share	1976 Range to date	98-76
Estimated 1976	11.80 per share	P-E based on 1976 estimate	8
Current annual dividend rate	2.80 per share	Yield	3.0%

(a) Primary. Fully-diluted earnings are: 1974 – $8.73; 1975 – $8.22; and 1976 – $11.15.

As had been rumored for the past few weeks, stronger than originally anticipated comparisons in non-agricultural lines gave Monsanto earnings of $4.40 per share in its seasonal peak first quarter, versus $2.79 in the corresponding 1975 inverval. This compares with the writer's recent expectation for results of about $3.80 and an original estimate of $3.40. Because the source of the variance in profits for this period lies mainly in the plastics and fibers areas, which are not subject to the extreme seasonality that characterizes the farm chemicals business, the implications for year-to-year profit increases in subsequent quarters also appear more favorable than had been forecasted earlier. Accordingly – and despite the likelihood of at least modestly negative comparisons in ag chemical results over the near term – the writer has increased his full year 1976 estimate from $10.00 per share (primary) to $11.80. The projection continues to allow for a sloughing off in the rate of sales and earnings improvement in the second half, in line with H. C. Wainwright's expectations for trends in economic activity.

In 1977, a possible industrywide carryover of herbicide inventories at the distributor/dealer level could lead to unaccustomed competitive pressures on this major source of Monsanto's earnings. But such a development is quite speculative at this point and, in Monsanto's case anyway, the company has a material potential offset in its new preplant or post-harvest herbicide, "Roundup," which should be swinging into substantial black figures next year. On balance, it is likely that a much more potent influence on company results in 1977 will be the trend and level of economic activity and its impact on the non-ag sectors of the business.

Current Operations

Sales in the first quarter rose 29% from 1975's $913 million to more than $1.17 billion. Monsanto does not have an overall selling price index but, based on indexes for the Textile,

Polymers & Petrochemicals and Industrial Chemicals groups, it appears that *companywide* realizations have improved 2%-3% since the end of 1975 – and possibly 6%-8% on a year-to-year basis. Physical volume, then, may have risen some 21% from the initial period of last year.

Pretax operating income was $272 million, up 62% from the previous record first quarter high of $168 million in 1975. Of this year-to-year gain of $104 million, Monsanto Textiles Company contributed one of the largest shares, having swung from an ultra-depressed $31 million deficit in the initial period of 1975 (the nadir of the textile recession) to an $11 million profit in the quarter just ended. An advance of equal magnitude was reported by the Polymers & Petrochemicals Company (plastic resins, mainly), where deflated year-earlier results helped produce an upswing of $42 million. All other non-ag divisions combined showed only a small year-to-year improvement, partly in light of the continuing losses being absorbed in certain Commercial Products operations (the Cycle-Safe bottle).

Monsanto Agricultural Products Company, as had been expected, registered a modest earnings improvement, with lower fertilizer results offsetting part of a "greater-than-10%" increase in herbicides operating income. First-quarter per share net broke down roughly as follows:

	First-Quarter E.P.S. (a)		
	1975	1976	% Change
Agricultural	$2.16	$2.41	+12%
Textile	(0.45)	0.18	–
Polymers & Petro.	0.06	0.78	N.M.
All other	1.02	1.03	+ 1
Total	$2.79	$4.40	+58

(a) Based on writer's estimates of tax rates by individual segment.
( ) Denotes deficit.
N.M. Not meaningful.

1976 Prospects

As indicated earlier, the fact that the *non-ag* portion of Monsanto contributed most to the superlative first-quarter performance augurs favorably for the near-term profit trend. This is the case not only because the non-farm chemical lines are less seasonal (and thus a strong first-quarter has greater forecasting value) but also because the Agricultural Company seems likely to show a decline in both sales and earnings in the second quarter and fairly flat results in the seasonally less significant second half.

Though the ag business will be discussed in more detail in a later section of this report, it should be noted here that this division's second quarter will bear the dual burden of comparison with a far healthier year-ago environment for nitrogen fertilizer, as well as the delayed effect of last December's early shipment program for herbicides which "borrowed" 22¢ per share of earnings from 1976 – in effect, all from the second quarter. Though some observers believe ammonia-based fertilizer prices will soon begin to firm, ample down-the-pipeline inventories have pressured realizations to a level down some 25%, year-to-year, and probably not too much of this shortfall can be made up in the brief remainder of the spring

shipping season. From a corporate point of view, Monsanto has been able to offset some of the impact of reduced ammonia prices by diverting more of this material to the production of fiber intermediates, but from the standpoint of the *Ag Company* bottom line, all such a policy does is add the effect of lowered volume to that of cut prices. Thus, overall ag earnings should drop at least modestly – and *perhaps* by as much as 30¢-40¢ per share – from the record $1.12 earned in this sector in 1975's second quarter, when fertilizer profits were optimum and herbicides reflected a normal volume of late-season deliveries.

As may be agreed by long-time observers of Monsanto, the forecasting of the company's earnings at or near cyclical turning points presents some challenge. With pretax (non-ag) operating margins of only 11% even under 1974's preternaturally sanguine conditions, Monsanto has considerable sensitivity to swings in demand. Right now, of course, the swing is strongly upward and the challenge to analysts is to keep up with the bottom-line impact of favorable conditions without succumbing to the temptation to engage in a little straight-line extrapolation. Though the timing is hard to pinpoint, there are signs pointing to a rebirth of more rapid inflation in industrial prices (and costs), and some slackening in the rate of gain in corporate unit volume and profits, probably beginning in the second half. If events develop along these lines, Monsanto can be expected, as always, to be a bellweather of change in the economic climate.

Under such a set of circumstances, at least one important segment of the company may have already seen its peak demand months; synthetic fibers customarily lead changes in the general economy by up to a year. Considering also that the first quarter of 1975 was by far the low of the past cycle (for non-ag businesses) and that subsequent quarterly comparisons will become much less easy, there are grounds for expecting progressively less robust earnings increases from this point on – for both non-farm chemical lines and Monsanto overall – with some possibility of a year-to-year decline in results in the fourth quarter.

These basic assumptions underlie the writer's 1976 projections as presented in the following table.

(See table on following page)

Table I

Monsanto
1976 Projection

	1974			1975			1976 Estimate			Sensitivity of E.P.S. to Changes in:
	Ag	Non-Ag	Total	Ag	Non-Ag	Total	Ag	Non-Ag	Total	
Net sales	$ 411 +65%	$1,087 +31	$1,498 +32%	$ 547 +33%	$1,078	0	$1,625 +4%	$ 1,570 +4%	$3,195 +206	
Physical volume	+12%	0	+1%	+24%	–10%		–6%	11%		Prices – 6¢
Selling prices	+29%	+31%	+31%	+24%	+11%		+10%	– 6% (a)		Volume – 3¢
Employment costs	$ 76 +20	$ 727 +15	$ 803 +16	$ 90 +18	$ 803 +10	$	893 +11	$100 +11	$ 990 +11	Feed & energy – 12¢
Avg. no. employees			+2.5%						+10%	
Employment cost/employee			+13.1%						+0.8%	
Raw materials & services	$ 123 +38	$1,850 +46	$1,973 +44	$ 169 +37	$1,843	0	$2,012 +2	$ 192 +14	$2,226 +21	
Hydrofeeds & petrochem.	$ 29	$ 371	$ 400 +185	$ 34	$ 356		$ 390 – 2	$ 41	$ 442	
Unit consumption			0							
Unit cost			+185%							
Energy	6	189	195 + 50	8	244					
Unit consumption			–5%							
Unit cost			+58%							
Other raw materials	57	737	794 + 32	87	542					
Unit consumption			–9%							
Unit cost			+45%							
Services, etc.	31	553	584 + 8	40	701	– 2				
Depreciation	$ 10	$ 162	$ 172 + 1	$ 15 +50	$ 158	– 2	$ 173 –	$ 20 +33	$ 175 +11	
Operating income	$ 202 +66	$ 384 +22	$ 550 + 35	$ 273 +35	$ 274	–21	$ 547 – 1	$ 258 – 5	$ 489 +78	
Margin	49.3%	11.3%	15.7%	49.8%	8.9%		15.1%	45.3%	12.5%	
Interest expense	–	43	43	–	56		56	–	80	
Other income	–	67	67	–	45		45	–	40	
Pretax income	$ 202 +66	$ 372 +28	$ 574 + 40	$ 273 +35	$ 263	–29	$ 536 – 7	$ 258 – 5	$ 449 +71	
Margin	49.3%	12.1%	16.4%	49.8%	8.5%		14.8%	45.3%	11.9%	
Taxes	$ 88	$ 163	$ 251	$ 120	$ 110		$ 230	$ 106	$ 184	
Rate	43.7%	43.7%	43.7%	44.0%	41.8%		42.9%	41.0%	41.0%	
Net income	$ 114 +62	$ 209 +24	$ 323 + 36	$ 153 +34	$ 153	–27	$ 306 – 5	$ 152 – 1	$ 265 +73	
Preferred dividends	–	6	6	–	5		5	–	5	
Net to common	$ 114	$ 203	$ 317	$ 153	$ 148		$ 301	$ 152	$ 260	
E.P.S. – primary	$3.33 +58	$5.92 +24	$9.25 + 34	$4.43 +33	$4.19	–29	$8.63 – 7	$4.35 – 2	$7.45 +78	
– diluted	3.23	5.73	8.73 + 33	–	–		8.22 – 6			
Number of shares			34.2				34.5			

(a) *All of change reflects fertilizer prices.*

Note: Breakdown of costs between Ag & Non-Ag is writer's estimate.

Noteworthy in the preceding estimates is the probable offsetting effect of sharp increases in interest expense and the depreciation accrual (after eight years of near-stability at the $175 million level*) on the one hand and a material drop in the tax rate on the other. Reflecting a major increase in project completions, the investment tax credit is projected to jump from 1975's $22 million to about $40 million this year – an *increase* equivalent to approximately 2.7% on the tax rate, or 52¢ per share.

The Herbicide Situation

There is a certain irony in the current widespread concern over the prospects for herbicide profits since the degree of any anxiety on this score is inevitably proportional to the tremendous success of this line for most producers in recent years. This is nowhere more true than in the case of Monsanto, the greater part of whose huge ag chemical earnings is derived from corn/soybean herbicides. The data below provides some perspective on the significance of farm chemicals in general not only to total company profits but to its capital generating capability as well.

Monsanto Agricultural Products Company
(In millions)

	1971	1972	1973	1974	1975	Compound Annual Growth
Sales	$200	$222	$283	$411	$547	28.5%
Operating income	68	81	122	202	273	41.5
Margin	34.1%	36.4%	42.9%	49.3%	49.8%	
Operating income as % of MTC	38%	37%	30%	37%	50%	
Agricultural						
Estimated net income	$ 40	$ 49	$ 70	$ 114	$ 153	
Capital expenditures	8	15	12	20	90	
Rest of MTC						
Estimated net income	$ 54	$ 73	$168	$209	$153	
Capital expenditures	197	153	193	293	438	

The writer estimates that, but for the ag contribution to net cash generation, Monsanto would have had to increase by roughly $175 million the $227 million it has borrowed (net) over the past five years.

The next table attempts to draw a bead more narrowly on the relative importance of the corn/soybean herbicides ("Lasso" and "Ramrod") within the Agricultural Products Company's total business.

(See table on following page)

The accrual was beginning to rise in the early 1970's when management opted to switch to the straight-line method for financial reporting purposes.

Agricultural Chemicals 1975
(In millions)

	Sales		Oper. Income		Margin
Total	**$547**	**100%**	**$273**	**100%**	**49.8%**
Lasso/Ramrod	280	51	174	64	62
Other herbicides	97	18	48	18	50
Other pesticides	40	8	20	7	50
Fertilizers	100	18	25	9	25
Feed supplements, etc.	30	5	6	2	20

Source: Writer's estimates for individual lines.

In anticipation of the expiration of the "Ramrod" patent last December, Monsanto had been steadily de-emphasizing the product, putting its push behind the newer (and more broadly effective) "Lasso." As a result, the latter accounted for by far the larger portion of the $280-odd million of sales of the corn/soybean herbicides. By itself, then, "Lasso" is more important to Monsanto's bottom line than the entire Polymers & Petrochemicals group or the Textiles Company in its best year of the past five for which such figures are available.

Data such as these give point, if not poignancy, to the investor concern aroused by the termination this season of the tight supply conditions that had prevailed in the past few years and the resultant dilatory attitude of farmers toward buying their herbicide requirements. In its final survey of April 1, the Department of Agriculture discovered a further slight increase in farmers' planting intentions for corn (by far the most important crop use of herbicides); growers apparently plan to devote 82.7 million acres to this grain, up 6.2% from last year. However, while farmers are now said to be ordering heavily – and there seems to be no doubt that the economics of applying weed control chemicals are as favorable as ever (a 3- or 4-to-1 payback) – Monsanto's surveys show that as of the week of April 12, farmers had taken only 50% of their requirements versus over 80% at the same date in 1975. With the third week in April looming as the planting deadline in much of the Corn Belt – and a couple of weeks thereafter the latest date for application of pre-emergent herbicides – the question arises as to whether the distribution system can deliver all the product demanded in the time available. Equally at issue is the degree to which that demand will exceed last year's *ex* any delivery problem.

In general, like questions can be raised in the case of the soybean crop, but here the planting deadline is more distant – about mid-May – so that growers will presumably have the benefit of the herbicide availability experience for corn as a guide to the timing of their own orders. Here, though, the April 1 Department of Agriculture survey continued to indicate that acreage will show a drop on the order of 10%.

On the supply side, of course, there has been a major expansion in the capacity of herbicide producers. And because of the shortages that resulted in some lost business in each of the past two seasons, the buying pressure from distributors and dealers in advance of the present season resulted in much of this new capacity being utilized. Unfortunately, statistics are very scanty, but this observer believes that most producers have increased capacity between 25% and 50% in the past two years. (The first phase of Monsanto's 50% expansion in "Lasso" capacity came on stream in advance of the 1975 season, and the larger, second phase is

scheduled for third-quarter 1976 completion.) And at least two of the leading manufacturers – Monsanto and Stauffer – were operating "flat out" going into this spring. This is against the background of a market that, at best, has had about a 15% growth rate.

Accordingly, whether or not all of the herbicide demanded by corn growers can physically be delivered in time, there is considerable doubt as to size of the probable carryover of inventories (at the distributor and dealer levels, primarily) at the close of the current season in June. Because the success of 1976 for the manufacturers was an accomplished fact in advance of this season, downstream inventories are largely a problem for next year.

Of course, there is room for substantial variation in the results of individual companies. Most expect to do better than the industry. In Monsanto's case, such an expectation at least has the support of a record of increasing market penetration to date. By its own account, the company's share of the herbicide-treated acreage planted to corn and soybeans has grown as follows (the 1976 estimates are those of the writer):

Corn/Soybean Herbicide Market & Monsanto Share
(Acres in millions)

Crop Years	1973	1974	1975	Estimated 1976
Corn				
Acres planted	71.9	77.8	77.9	81 approx.
Acres treated with herbicides	62.6	68.5	68.6	72
Percent of acres planted	87%	88%	88%	89%
Acres with broadcast application	44.4	50.7	51.5	55
Percent of acres treated	71%	74%	75%	76%
Acres treated with Lasso/Ramrod	20.7	22.6	24.0	26
Percent of acres treated	33%	33%	35%	36%
Soybeans				
Acres planted	56.7	53.6	54.6	50 approx.
Acres treated with herbicides	46.5	45.0	47.0	43
Percent of acres planted	82%	84%	86%	86%
Acres with broadcast application	28.4	27.5	29.1	27
Percent of acres treated	61%	61%	62%	63%
Acres treated with Lasso/Ramrod	10.2	10.8	14.1	14
Percent of acres treated	22%	24%	30%	32%

Two factors should be borne in mind in appraising the statistics in the preceding table. First, Monsanto's "share" is a fairly accurate measure of the acres treated with "Lasso" or "Ramrod" but, of necessity, there is no attempt to adjust the percentage for the very great extent to which these materials are applied by farmers in combination with competitors' products to give protection against a broader spectrum of weed types. Thus, comparable

percentages for all herbicide producers would add to a total very much in excess of 100%. Secondly, the growth in the broadcast application method (i.e., covering the entire field) is important in that it requires two to three times as much herbicide as does banding (spraying only the crop rows).

The writer's own belief is that farmers' demand for Monsanto's corn/soybean herbicides will be up sharply this season, but that delivery problems in the time available will result in some lost business. Obviously, no one can be sure of the accuracy of judgments of this type, but for the purposes of the figures used in arriving at our estimate of Monsanto's 1976 ag earnings, the company's sales of "Lasso"/"Ramrod" to distributors and dealers were put at a level 15% above 1975. Dollar sales and physical shipments of these herbicides will show the same percentage change this year, as the last price increase took place in 1974, (Monsanto having opted not to participate in a second round of industry price hikes last summer). At the same time, the writer believes there to be a real risk – perhaps an odds-on one – that dealers' deliveries to farmers will fail to match the 15% increase in their purchases from Monsanto.

1977 Prospects

Agricultural. As indicated earlier, any inventory carryover from this spring will be predominantly a 1977 problem for the manufacturers. Monsanto estimates that the carryover of corn/soybean herbicides will be 15%-20% (of prior-season requirements) versus 13% at the end of the 1975 crop year and a smaller percentage in 1974. Whether a carryover, of, say, 20% would be sufficient to induce a proliferation of discounting, special promotions, etc., at the manufacturers' level next winter is a matter of speculation. There has not been a comparable set of circumstances in recent years, and it has been something of an article of faith that the proprietary nature of the products was proof against the kind of price deals that regularly afflict commodity plastics and fibers, for example. In this observer's opinion, there is nothing inherent in a proprietary herbicide that would shield it from price competition *if* there are at least several products of acceptable efficacy available to the market (as there are) and they collectively come into oversupply (which they may).* Definitive information as to the size of the carryover will not become known until after Monsanto conducts its August survey of stocks in the hands of dealers and farmers, but if their inventories do wind up the season at burdensome levels, the fact is likely to become rather quickly known throughout the industry by June or July. It will be something to monitor.

The extent to which competitiveness in pricing may develop next season will also be a function of the trend in demand in the 1977 crop year. Monsanto itself concedes that some of the several growth factors are close to playing themselves out. Relatively little new acreage can be added to the aggregate already devoted to the key herbicide-using crops – corn, soybean and cotton. Similarly, the percentage of planted acreage treated with weed control

**As a sidelight of this subject, 1977 will be the first commercial marketing year for "Prowl," American Cyanamid's new pre-emergent soybean herbicide. Preliminary indications are that "Prowl" has no great competitive edge, which may heighten the risk of a "price" approach to marketing.*

chemicals is probably approaching a practical high near 90%. There probably is some further "mileage" in the switch from banding to broadcast application. And from Monsanto's standpoint, at least, there is some added potential for wider use of "Lasso," which is most effective against grassy-type weeds, in combination with broadleaf-type herbicides that are currently being applied alone by some farmers. The company estimates that about half of the treated corn/soybean acreage is *not* being treated with grassy-type herbicides.

Even so, growth in overall domestic demand for corn/soybean herbicides is seen (by Monsanto and this observer) as receding to perhaps a 5% pace within the next couple of years. Faster growth is possible in foreign markets but these have yet to prove important for "Lasso"-type products.

The company expects that beyond this year, the slack in its ag chemical growth will be taken up by rapidly expanding sales of some of its other products. These include such items as "Machete," a rice herbicide; "Avadex," a product against wild oats in wheat regions; and "Polaris," the growth regulator developed for sugar cane.

But much more important is "Roundup," the company's first – and assertedly the industry's first effective – non-persistent herbicide for control of perennial weeds such as Johnson grass and quack grass. Many of these weeds have proved highly resistant to earlier products of other manufacturers, but proper application of "Roundup" (either before planting or after harvest) has been found to effectively destroy the entire root system of such weeds, yet with the herbicide becoming inactivated on contact with the soil and thus posing no threat to the subsequent crop or the environment.

The first year of commercial sales of "Roundup" was 1975, and some of the vital statistics of the herbicide are as yet indeterminable; for example, it is said to be so effective that it may possibly require only biennial or triennial application. Such considerations, as well as the breadth of its ultimate crop clearances, obviously affect the projectable size and growth of its market. Even so, Monsanto believes that "Roundup" can eventually exceed the size of "Lasso," especially as, unlike "Lasso" it has large potential markets abroad. (In fact, its initial applications have been in Malaysia in rubber and palm plantations.)

Management estimates that sales will reach the vicinity of $30 million this year, up from $10 million in 1975, with a further impressive, if smaller, percentage increase likely in 1977. During 1976, little, if any, of the expansion in "Roundup" volume is believed likely to carry down to the bottom line, since the Ag Products Company is expending many profit dollars on sampling and other marketing costs. Thereafter, however, the company believes that there is no reason to expect that margins on "Roundup" will differ from the kind of spreads associated with other proprietaries such as "Lasso."

It is obviously early to attempt a projection of Monsanto's farm chemical profits in 1977. But it is apparent, on looking around the industry, that there are few, if any, rivals who have major new products coming along in time to hold promise of constituting material offsets to the possible development of growth and pricing problems in the pre-emergent corn/soybean herbicide sector. Assuming (a) a recovery in ammonia pricing to a level intermediate between the spring 1975 highs and current realizations; (b) an increase of only 5%, say, in the ongoing income from established herbicides and other non-fertilizer products; and (c) a positive swing of $25 million in the operating contribution of "Roundup," Monsanto's 1977 ag results would fall in a range of $4.75-$5.00 per share, versus the 1976 estimate of $4.35.

Adopting a more pessimistic scenario – which *could* prove justified – Ag earnings of $4.00-$4.25 per share would follow from the premise of (a) no recovery in ammonia prices; (b) a 15% drop in "Lasso"/"Ramrod" profits; (c) a 5% gain in other non-fertilizer ag products; and (d) a $15 million positive swing from "Roundup." Such a contraction in corn/soybean herbicide results would probably occur only if some pricing (discounting) pressures develop next season at the manufacturers' level.

Non-Ag Business. It can be appreciated that, in a business with margins as sensitive to the winds of economic change as Monsanto's, results in 1977 will be very deeply shaped by the slope of the real GNP curve going into next year. And there have seldom been wider divisions among forecasters as to the implications of the several "scenarios" for chemical output. DuPont, for example, is projecting back-to-back increases of 12% in the industry's production for 1976 and 1977. In our view, a gain on the order of 13% this year will be followed by one of possibly 5% in 1977, in consonance with the H. C. Wainwright economic construct.

The slowing in prospective chemical output has at least two major implications for companies such as Monsanto. First, there will be a marked reduction in the favorable volume leverage that is bolstering current margins. Secondly, with an increasing number of expansion projects (initiated on the heels of the 1973-1974 surge in profits) coming on stream, a gain of only, say, 5% in output would fall somewhat short of "filling" the industry's increment to productive capacity, and operating rates could actually decline slightly from the low 80's projected for 1976. This in turn would inhibit the rate at which inflating operating costs can be matched by price increases. In sum, the projected conditions would point to a mild contraction in margins in 1977 and only a modest increase in chemical profits. (In contrast, under a DuPont-type economic environment, shortages would probably begin to reappear in some sectors by the second half of next year, prices would undoubtedly reflect such a prospect, and earnings would continue the 1976 renaissance.)

There is little reason to believe that in its non-farm-chemical activities, Monsanto would follow a pattern substantially different from that sketched above for the industry. In 1976, for example, there should be a reasonably close (non-ag) correspondence between the company and its industry in both physical volume (+15% for Monsanto, vs. +13% for the industry) and selling prices (+7% for the company, +6%-7% for the industry), though because of its high operating leverage, Monsanto's projected total earnings gain of 37% is about one-third greater than that forecast for all of the twelve major chemical companies in the H. C. Wainwright coverage. Based on our industry view for 1977, therefore, Monsanto could be expected to produce non-ag results not much higher than the $7.45 per share now estimated for 1976. Giving effect to the very broad band of both economic and internal operating variability affecting results this far ahead, it obviously makes better sense to apply a range to possible earnings. In this case, $6.50-$8.25 per share seems reasonable, though the "sensitivity" factor should be borne in mind: each 1% by which selling prices fluctuate from a given estimate affects the bottom line by more than 60¢ per share.

Looking at both the Agricultural Company and other product segments together, then, it seems possible that overall 1977 earnings could fall in the range of $10.50 to $13.25 per share.

H. C. WAINWRIGHT & CO.
W. D. Williams

The Wall Street Transcript
May 24, 1976
Page 43,789

In a Special Report from H. C. Wainwright & Co., W.D. Williams writes that he has increased his full year 1976 estimate for MONSANTO COMPANY ($92) from $10.00 per share (primary) to $11.80, due to greater strength in the plastics and fibers area than was previously anticipated. The new projection continues to allow for a sloughing off in the rate of sales and earnings improvement in the second half. In 1975, EPS were $8.63. However, the Monsanto Agricultural Products Company seems likely, in the analyst's opinion, to show a decline in both sales and earnings in the second quarter and fairly flat results in the seasonally less significant second half. Overall ag earnings should drop at least modestly - and perhaps by as much as 30c-40c per share - from the record $1.12 earned in this sector in 1975's second quarter, when fertilizer profits were optimum and herbicides reflected a normal volume of late-season deliveries.

Mr. Williams believes it is possible that 1977 EPS could fall in the $10.50-13.25 range, with the most potent influence on company results being the trend and level of economic activity and its impact on the non-ag sectors of the business. However, the analyst cautions that a possible industrywide carryover of herbicide inventories at the distributor/dealer level could lead to unaccustomed competitive pressures on this major source of Monsanto's earnings. Depending on the set of assumptions used, Monsanto's 1977 ag results might fall in a range of $4.75-5.00 per share or in the $4.00-4.25 per share range (versus the 1976 estimate of $4.35). MONSANTO COMPANY, Special Report, H. C. Wainwright & Co. (W. D. Williams), April 28, 1976, 10 pages. [RP 3063]

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Jan 77 396 pp $4[illegible] (Release Date: April 1977) A definitive magnum opus on every conceivable aspect of the industry. Outlines the chemistry & uses of coal sources & quantities, basics of coal mining, pricing & selling, all aspects of all types of mining, economics including labor productivity & land, and details the coal producing companies. Coal cannot be produced without equipment outlines underground & surface equipment, producers, trends & outlook. This report has become a standard reference. **CP-375-N**

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JAPANESE COKING COAL CONTRACTS WITH FIVE U.S. SUPPLIERS Apr 77 24 pp $275 Summarizes & analyzes contracts at Pocahontas, Consolidation Coal, Island Creek, Eastern Gas & Fuel, & Westmoreland in light of likely U.S. energy policy and potential world demand for higher quality coals. Very well detailed and lucid discussion, with investment implications. **CJ-441-E**

• **ALUMINUM INDUSTRY STATISTICS—FIVE YEAR FORECAST** May 77 20 pp $225 Major five-year forecast envisions aluminum industry characterized by rising demand, limited supply and rising prices. 1976-81 estimates of U.S. Aluminum Demand/Supply balance; 1973-81 Estimates World Primary Aluminum Demand; 1971-81 Estimates World Primary Aluminum Demand; 1975-81 Estimates World Primary Aluminum Metal Balance. Discussion of order rates, inventories & shipments prospects. **CR-514-M**

• **ALUMINUM INDUSTRY: EMPHASIS ON CONTAINER MARKET** Jun 77 41 pp $175 Review and analysis of first quarter results for Kaiser, Alcan, Reynolds and Alcoa with key data and developments in each. Definitive review of container market: market breakdown, regulatory environment, growth potential. **CC-486-M**

- **COPPER** May 77 23 pp $175 Company developments inv Newmont Mining, Phelps Dodge & Kennecott 1977 U.S. Copper market estimates. Critique of Kennecott's projections of supply short-fall for 1981-85. General review of pricing patterns, inventories and political factors. **CC-502-N**

Chemical

- **IMPLICATIONS OF ENERGY PLAN FOR CHEMICAL INDUSTRY** May 77 16 pp $125 Impact of plan on chemical industry, specifically the Crude Oil Prices/Equalization tax, natural gas price legislation, oil and natural gas consumption tax & petroleum/natural gas prohibitions. For instance, sees intense margin pressure on upstream chemicals and oil refineries due to consumption taxes. Lengthy review of crucial implications. **CV-480-C**

CHEMICAL INDUSTRY: POISED FOR SELECTED CYCLICAL GAINS Mar 77 37 pp $280 This broad analysis of the current cyclical gains in the industry sees downstream companies out performing upstream companies and looks for a secular recovery in fibers. Supply/demand data projected annually thru 1980 for 8 noncellulosic fibers, 5 thermoplastics & 10 commodity chemicals. Also, producers' data on the latter. Capsule analyses of Monsanto & DuPont with brief comments on other major firms. An excellent Chemical Industry report. **CV-398-C**

- **PESTICIDES MARKET: '77** Apr 77 23 pp $80 Report on "what the investment analyst looks for in evaluating pesticide cos." Based on Jun 77 seminar on pesticides market. Reviews 77 trends, pricing, oversupply, patent expirations, new products & demand outlook. 10 useful tables incl. Pesticide Capacity Additions & Growth thru 1980. **CU-479-C**
- **PESTICIDES—REGULATIONS UPDATE** Mar 77 25 pp $80 Description of ongoing changes in pesticides regulatory program concentrating on the Rebuttable Presumption Against Registration process. Impact of current practices is projected. Full documentation of candidate chemicals provided. **CU-478-C**
- **CORN & SOYBEAN HERBICIDES: 1977 GROWTH PROSPECTS & LONG-TERM PRICING OUTLOOK** May 77 21 pp $125 Appraisal of corn and soybean herbicide market pricing factors, new product entries, key statistics. Market share 1975-76 for leading corn & soybean herbicides by acreage and dollars. Update of Jan 76. **CV-477-C**

OUTLOOK FOR CORN AND SOYBEAN HERBICIDES Jun 76 67 pp $325 A very major study forecasting continued strength in this market despite slowing U.S. growth through 1980. Cites fundamentals, growth prospects, patent expirations, capacity additions and new entrants. Marketing distribution mechanics, international outlook and brief company comments. **CV-257-C**

- **REVIEW OF EUROPEAN CHEMICAL STATISTICS** Apr 77 10 pp $100 Statistics on production of major products, plastics, man-made fibers, fertilizers, & estimates of capacity utilization in West Germany, France and United Kingdom 4th quarter 75 thru year end 76. **CE-481-C**

INDUSTRIAL GAS INDUSTRY OVERVIEW Sep 76 23 pp $275 Production, costs, R&D, distribution, products and end markets discussed. Analyses of essential aspects of major competitors, inc market shares. A unique, comprehensive report. (Available also with detailed company reports on producers.) **CS-302-C**

Health Care

- **MULTI-SOURCE DRUGS: MORE LOW COST SUBSTITUTES?** May 77 20 pp $175 Examination of recent trends of generic prescriptions, forces leading to increasing rate of product substitution by pharmacists, detailed exposure of major firm's product line to substitution carefully portrayed. Possible future strategies outlined. Comprehensive treatment of major developments. **CE-488-H**
- **ETHICAL PHARMACEUTICAL PRICE CHANGES: "GROWTH THROUGH PRICE VS. VOLUME"** Jun 77 9 pp $80 Earnings growth in drug industry increasingly dependent on price increases. But this trend limited by inroads of low cost substitutes. Details of major pharmaceutical firms' pricing policies & analyses of incremental revenue to firms, due solely to price increases, 76-77. **CE-484-H**

THE WORLD PHARMACEUTICAL MARKET Mar 77 72 pp $325 Overall review of ethical pharmaceutical industry in three sections—I) perspective of total market including worldwide sales by market and drug categories through 1980, II) market share, sales figures U.S. and foreign and discussion of trends for each of 11 therapeutic markets, III) review of operations of major manufacturers, commitments, product growth, sales projections through 1980 in each market. **CE-391-H**

BETA-BLOCKING AGENTS Mar 77 20 pp $175 Summary analysis of commercial significance of new B-blocking agent products. Pharmacology, clinical uses and world market forecasts by therapy through 1980. Estimated market share and sales for antianginal, antiarrhythmic and hypotensive market for beta and non-beta products through 1980. Opportunities outlined for U.S. companies in this new class of compounds. **CG-437-H**

DRUG INDUSTRY POSITION PAPER Dec 76 57+ pp $225 Major series on recent industry trends analyzes 1970-76 performance of major drug companies. Emphasis on ethical drugs, domestic & foreign markets, regulatory atmosphere, product competition and impact of exchange fluctuations. Outlines key elements in reinvigorating industry fundamentals. **CH-310-H3**

Cosmetics/Toiletries

- **MARKET EVALUATION OF U.S. COSMETICS/TOILETRIES INDUSTRY** Jun 77 30 pp $150 Major study on the economic, demographic and social factors that affect the cosmetic industry. Examines through 1980 for retail consumption toilet articles and preparations. Analyses of consumer usage patterns, and social factors leads to positive outlook. Clear historical insights. **CJ-480-H**
- **PERSONAL CARE: U.S. CONSUMER EXPENDITURES 1963-1982** Apr 77 40 pp $175 A special statistical reference report on fragrances, cosmetics, toiletry and laundry products. Historical growth, prospects, and market characteristics for each. 1963-82 detailed statistics on toilet waters, colognes, perfumes, bath preparations, facial skin aids, lipstick, rouge, eye products, powders, make-up base, hair products, shaving products, personal cleanliness, oral hygiene, feminine needs, hand products, detergents, soap powders, dishwasher compounds, cleansers, fabric softeners and bleaches. Comprehensive overview. **CH-481-H**

INTERNATIONAL COSMETICS, TOILETRIES, AND HOUSEHOLD PRODUCTS MARKETS UPDATE May 77 15 pp $80 Review of consumer markets in Germany, France, England, Japan, UK and Italy. 1976 sales estimates by company in each country. Brief discussions of significant company approaches. **CV-449-H**

FRAGRANCES: THE STATE OF THE MARKET Mar 7 20 pp $180 Excellent overview of U.S., European & Japan markets, emphasizing U.S. Details new products 1976-1978, advertising, sales, use patterns. Nothing revolutionary appears in the wind, but which companies will balance new products with steady growth is the question addressed in the exte perspective of this report. **CO-387-H**

- **FRAGRANCE MARKET SHARES** Mar-Jul 77 10-15 pp $500 Maxwell Associates comprehensive market share figures for 1976 and mid-year 77. Women's fragrance ranked by major cos & major brands. Also, women's fragrance market share broken out by type of line: full line, door to door, broad fragrance, single line (higher priced) and full line (fd. distribution). **CH-18-H**
- **COSMETIC RETAIL MARKET SHARE** Mar-Jul 77 10-15 pp $500 Maxwell Associates' comprehensive market share figures for 1976 and mid-year 77. Domestic retail market share for foundations, face powder, blushes and rouge, eye make-up, lipstick & gloss, nail care products and facial skin care products (non-acne) broken out by major brand and co. **CB-17-H**
- **SELECTED TOILETRIES MARKET SHARE & ADVERTISING EXPENDITURES** Mar-Jul 77 10-15 pp $500 Maxwell Associates' comprehensive market share figures for 1976 and mid-year 77. Domestic retail market share for deodorants & antiperspirants, shaving cream, razor blades, toothpaste and mouthwash broken out by major brand and company. Also included 1976 advertising expenditures & 4 metro retails for each brand. **CB-18-H**
- **HAIR CARE PRODUCTS MARKET SHARE AND ADVERTISING EXPENDITURES** Mar-Jul 77 10-15 [illegible] $500 Maxwell Associates' comprehensive market share figures for 1976 and mid-year 77. Domestic retail market share for shampoo (non-medicated), hair conditioners & creme rinses, hair spray & set, hair coloring broken out by major brand and co. Also included: 1976 advertising expenditure totals for each brand. **CB-19-H**

HEALTH & BEAUTY AID: SHARE & SPENDING REPORT Apr 77 19 pp $290 Based upon an exclusive audit service, this report details 24 H & BAs categories by food store case movement & Mfg $ sales. Top brands market shares are detailed by Mfg $ sales and Advertising dollars, 1975-77E. Leading companies Growth/Share strategic outlook is presented with comments on specific dynamic situations highlighting non-aerosol deodorants, the sanitary protection market and Revlon's emergence in toiletries. **CA-448-H**

WEST COAST DRUG CHAINS Jul 76 30 pp $150 Comprehensive review of West Coast drug chain growth and trends. Comments on Calif. industry plus analysis of Longs, Payless Northwest, Pay 'n' Save, Skaggs and 3 others. Insightful. **CG-394-H**

Food

- **PURCHASE MEAL MARKET** Apr 77 20 pp $750 Maxwell Associates' annual comprehensive report on the purchase meal market in 1976. Sales by product group, market share by co and detailed statistics for co's in the following categories: Hamburgers & Hot Dogs, Full Menu, Steaks, Mexican, Seafood & other. Statistics incl sales, units & units added, snacking & av. check per person. **CS-21-F**

SUPERMARKET SURVEY OF FOOD INDUSTRY PRODUCTS Mar 77 11 pp $150 A highly unusual survey of selected food products from 10 major manufacturers based upon nationwide supermarket visits. Products include: coffee, cereals, cheese, yogurt, margarine, dough mixes, powdered desserts, pet foods, soup, tuna fish, frozen dinners and pizza. Shelf prices & couponing activity provide a basis for analyzing company strategies. Trends in each product category are highlighted. **CO-388-F**

SUGAR & CORN SWEETNER MARKET PERSPECTIVE Dec 76 40 pp $325 In-depth review of fundamentals, sugar market analysis, sugar demand trends & the relation of sweetners to sugar trends. 15 tables & 8 charts review world, U.S. & company data. Cites expansion plan of corn wet-milling producers. Sees production outstripping demand in sugar, corn sweetners to hold 19% of sweetner market by 1980. **CC-368-F**

- **WINE INDUSTRY** Mar-Jul 77 10-15 pp $500 The comprehensive Maxwell Associates' wine industry report (plus updates) analyzing market share by company and product 1976 and mid-year 77. Extensive review of other data as well: production, imports, consumption, data history. Comments on current trends. **CB-69-F**
- **THE LIQUOR INDUSTRY** Dec 76 20 pp $500 Maxwell Associates' liquor industry annual report. A detailed analysis of the industry by product (i.e. gin, bourbon, vodka, etc.), brands and company 1966-76. Market share of all brands selling over 1,000,000 9-gallon cases. **CB-69-F**

- **THE COFFEE INDUSTRY** Mar 77 5 pp $250 Maxwell Associates' annual coffee survey. Estimated market share by company & product 1968-76, for regular and instant coffee. Current analyses of consumption trends, incl. data on liquid consumption, coffee drinking by age group & percentage of persons drinking coffee and other beverages. **CB-19-F**
- **THE SOFT DRINK INDUSTRY** Feb 77 8 pp $500 Maxwell Associates' annual report analyzing consumption of soft drinks by company and product 1966-76. Market share figures given by company, product and type of drink (i.e. cola, lemon-lime, etc.). A thorough statistical reference work for 1976 results. **CB-11-F**

THE BEVERAGE INDUSTRY Apr 77 25 pp $225 Thorough analysis of uncertainties facing soft drinks and brewing. Projects industry performance under Saccharin ban, with & without a successful substitute. Evaluates FEA study on mandatory deposits. Examines costs, prices, volume trends & specific company details. Good overview. **CH-443-F**

- **THE U.S. BREWING INDUSTRY: A REAPPRAISAL** Jun 77 36 pp $175 Industry overview analyzing slow growth of last two years, industry volume & the effect of capacity additions on pricing. Capsule summaries of Anheuser Busch and Pabst Brewing. Estimates thru 1980 of capacity and operating rates. Volume, prices, costs, profits and packaging legislation outlook for 1977 & 78. **CJ-516-F**
- **PET FOOD INDUSTRY** Feb 77 5 pp $250 Maxwell Associates' comprehensive market share figures for pet food industry. Annual retail sales by brand for canned, dry, moist, whole biscuit dog food and canned, dry and moist cat food 1965-1976. Also: sales by type of product 1965-1976 and market share by company 1971-1976. **CB-10-F**

WHOLESALE FOOD DISTRIBUTION INDUSTRY Oct 76 36 pp $225 Examines the relationship between independent retail grocery stores and four major wholesalers. The retailers gain management know-how & wholesalers gain volume buying power. Retail growth has thus exceeded chain store sales. Extensive details on Super Value Stores, Fleming, Malone & Hyde, and Wetterau. **CZ-437-F**

PACKAGED FOODS SHARE & SPENDING, 1977 OUTLOOK Mar 77 28 pp $280 Dollar Sales and Advertising spending trends, 1975-1977E are presented for 30 food items based upon an exclusive market audit service. Details top brands, data in cases & mfg's $. Company emphases on Norton Simon, Quaker Oats, Ralston, General Mills, Heinz & Kellogg's analyzes the growth/share prospects of the packaged food segments of these companies and develops a view of their respective strategic outlooks. **CA-393-F**

Retail/Leisure

- **CURRENT APPRAISAL OF CONSUMER SPENDING** Apr 77 28 pp $100 Detailed forecast on consumer expenditures on general merchandise with graphic presentation of key indicators. 1968-78 estimates on consumer outlays and personal income. Thumbnail sketches of implications of above for retail, textile, apparel and home furnishings industries. **CU-489-R**

MOTOR CARRIER INDUSTRY Apr 77 32 pp $225 1977 outlook calls for volume gains close to trend, with a 5-7% tonnage gain. Market share gains of larger public motor carriers likewise should follow trend. 14 tables detail this broad review of industry fundamentals. **CC-488-T**

- **AIRLINE CAPITAL SHORTAGE THESIS** Jun 77 60 pp $225 The thesis is that the U.S. airline industry is about to enter an extended period of capital and capacity expansion constraints. This very current report details complete domestic trunk industry data and 1977-85 capacity/expansion requirements for each carrier. A thorough re-analyses based upon a similar report a year ago. **CR-510-T**

ANALYSIS OF THE TOY INDUSTRY Apr 75 45 pp $80 Examination & assessment of product mix & competitors in the toy industry. 12 individual companies analyzed. 1975 report not yet updated. An excellent buy. **CS-339-R**

LEISURE/RECREATION Feb 75 137 pp $250 Extremely comprehensive compilation of diverse data related to the industry. 112 tables and 25 charts portray a more conservative outlook for the area. Key industry: Economic factors, industry trends, investment prospects analyzed. **CL-210-G**

Appliances/ Household Products

- **HOUSEHOLD DURABLES MONITOR** Apr 77 45 pp $125 This report monitors and forecasts the economics of household durable products focusing on major appliances and color television. Assesses trends in consumer spending and gives extensive statistics on such factors as demand, mix, price, costs, and inventories at retail distributor and factory levels. **CK-491-R**

HOUSEHOLD PRODUCTS SHARE & SPENDING, 1977 OUTLOOK Mar 77 18 pp $250 This top report, based upon an exclusive market audit service, sees average growth of 6.3% for 1975-1977 period, contrary to assumption that household products growth does not outstrip population. Leaders' growth & market share is presented, household products and paper, heavy duty laundry detergents and new products in fabric softeners & light liquid detergents are detailed. Data by brand in cases, mfg's $, and advertising dollars for 1975-76-77E. **CA-388-F**

AIRCONDITIONING INDUSTRY REVIEW Mar 77 15 pp $100 Thorough industry overview, market share/factory shipments/growth potential for Unitary Equipment, Room Airconditioners and Central Engineering systems. Special emphasis on heat pumps, impact on R&D on energy cost escalation. Near and long-term growth prospects for industry. **CS-377-R**

- **SOAP & DETERGENT MARKET SHARES & ADVERTISING FIGURES** Mar-Jul 77 10-15 pp $500 Maxwell Associates' comprehensive market share figures for 1976 and mid-year 77. Domestic retail market share for heavy laundry detergents, light duty liquid detergents and bath and toilet soaps broken out by major brand and company. Also included: advertising expenditures for soaps and detergents for each brand's measured media spending for 1975 & 76. **CB-20-R**

HOUSEHOLD PRODUCTS INDUSTRY Jan 77 39 pp $180 Detailed overview of fundamentals, including demand trends, market shares, costs, international markets & currency, technology & patents. Good visual presentation highlights various soap, detergent, toothpaste & commodity trends. **CP-371-R**

EDP/Electronics

WORLDWIDE SEMICONDUCTOR INDUSTRY Jan 77 129 pp $395 Fully documented projections of near and long-term growth covering all phases of industry activity: component market product mix, customer markets, technology trends, macroeconomic factors, shipments, competition and detailed company performance. **CS-439-L**

- **MINICOMPUTERS: HOW BIG IS THE MARKET? HOW RAPID IS THE PENETRATION?** May 77 9 pp $50 Stimulating report maintains that market is incorrectly assessed by conventional market research techniques. Develops new model for sizing market and estimating penetration rate. **CY-458-L**

THE JAPANESE DIVISION OF WORLD EDP MARKETS Jan 77 9 pp $80 Japanese EDP is heavily supported by their government. Entry capability is targeted for 1980/81. Will they be a full systems vendor or major OEM supplier? Capsule analysis reviews the questions. **CY-373-L**

TRENDS IN SEMICONDUCTOR TECHNOLOGY Mar 77 22 pp $250 An excellent review of specific producers' product mix relative to the "technological deployment cycle" portraying the brightest prospects for companies strong in MMOS, PL and LS technologies. Clean graphic presentation of sophisticated data makes this overview especially potent for those dependent upon forecasting market share through 1980. **CA-434-L**

OPTOELECTRONICS Jun 77 39 pp $150 General review of developments in optoelectronics field: types of glass fibers employed, applications of fibers in communications systems, hardware requirements, degree of standardization & commercial and military prospects. **CI-515-L**

Communications/ Advertising

- **REGULATORY OVERVIEW OF THE TELECOMMUNICATIONS INDUSTRY** Jun 77 10 pp $40 Brief analysis of the regulatory environment of the telecommunications industry. Discussion of Carterfone, Specialized Common Carrier and Domestic Satellite Decisions and review of the telephone industry response. Summary of the status of current issues before FCC. **CS-453-L**

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TELECOMMUNICATIONS INDUSTRY Feb 77. 8 pp. $80. Capsule review of industry citing toll message & station growth, rate increases and capital spending for major participants. Sees continued "absolutely favorable" outlook. **CS-406-X**

NIPPON TELEVISION NETWORK AND TOKYO BROADCASTING SYSTEM Sep 76. 68 pp. $325. A major overview of Japanese television, inc. Extensive details on media usage and trends in that country. Discusses the role of Japan's government-operated network in competition with private networks, recent industry trends, advertising expenditures, and basic data on the two title companies. An essential tool for marketers in Japan, useful also for insight into government vs. public broadcasting issue. **CS-283-X**

OUTLOOK FOR ADVERTISING 1976-1980 Feb 77. 46 pp. $225. A top analyst presents his perspective on advertising revenue outlook and impact on advertising-dependent publishers. Fully documented assumptions and alternative models are considered for their implications. Appendix cites historical data, calculations and projections. A well detailed, sophisticated study. **CI-430-X**

Paper/Containers

PAPER INDUSTRY GAINS: 1977-78 Apr 77. 19 pp. $125. Review of paper consumption, inventory, production, capacity and pricing data. Sees capacity constraints precluding historic rates of growth. **CJ-439-P**

FOREST PRODUCTS/PAPER: HOW IMPORTANT IS TIMBERLAND? Feb 77. 16 pp. $125. Attempts to illustrate how timberland holdings are more important to forest products companies than to paper products. Succinct logic with ample data make an interesting case. Do timber holdings hedge against inflation? **CF-440-P**

DISPOSABLE DIAPERS MARKET STATUS Mar 77. 5 pp. $50. A brief survey based upon an exclusive auditing service reports on the P&G vs. J&J competition for market share. J&J seems to draw only from Kimbies' share. Data from selected markets. **CA-429-P**

GLASS & METAL CONTAINERS OUTLOOK Mar 77. 10 pp. $50. Prospects for glass containers continue sound as production costs rise less rapidly. Data on near-term shipments outlook, price trends & costs for both categories, plus brief comments on plastics & regulation. **CV-427-G**

Construction/ Industrial Products

• **CONSTRUCTION MACHINERY: CURRENT OUTLOOK AND COMPETITIVE TRENDS** May 77. 17 pp. $150. The question is not who will challenge CAT, rather who will follow closest behind. Thinking piece on marketing strategies with market share and positioning of industry leaders. Perspective through '78 and beyond, domestic and foreign. 5 charts 12 tables. **CK-460-M**

• **THE OUTLOOK FOR AGRICULTURE AND FARM EQUIPMENT DEMAND** May 77. 41 pp. $225. Domestic and foreign prospects for U.S. agriculture and farm equipment demand. Critical review of possible farm equipment demand determinants & buying power leading to market projections through '78 and beyond. Thorough historical background material. 11 charts 25 tables. **CK-458-M**

THE VALVE INDUSTRY Feb 76. 26 pp. $125. Discussion of general makeup of valve industry followed by detailed reviews of DURIRON, HENRY PRATT, XOMOX, MARK CONTROLS & KEYSTONE INTERNATIONAL. Company comparisons emphasize financial differences. **CB-387-M**

TAPERED ROLLER BEARING INDUSTRY Jun 76. 32 pp. $125. Background and strategies of TIMKEN & BRENCO. Brief overview of industry with market share data. Co. sales break-down and operating statistics. **CB-311-M**

COLD EXTRUSION INDUSTRY Jan 77. 53 pp. $325. A major update of a 1973 survey with emphasis on Masco. Defines the industry, examines the process & equipment & costs. Quantities and markets & production. Lists producers, plant locations, types of forgings produced & output. Unusual detail. **CK-373-M**

THE FAUCET INDUSTRY Dec 76. 33 pp. $275. Detailed analysis of the overall faucet industry with special emphasis on Masco Corporation. Detailed break-out of Masco's product line, shipments and markets. 17 tables delineate single-handle faucet market penetration, faucet demand, long-term sales outlook & more. Comprehensive. **CK-385-M**

MACHINE TOOL INDUSTRY Feb 77. 12 pp. $125. Prospects look bright based on higher new business backlog, trend toward modernization of equipment, pending facilities expansion phase, improved pricing climate & promise of greater attainable profitability. Four companies profiled. **CA-425-M**

• **BUILDING NOTES** June 77. 46 pp. $175. Forecasts on national level through 4th quarter '77 for Housing Starts & completions. Thorough statistical perspective on New Home prices, house sales, apartment situation, and total construction spending. Well organized. **CK-468-L**

Rails/Auto/Air Trucking/

RAILROADS—ARE THEY A TURNAROUND INDUSTRY? Mar 77. 42 pp. $325. This very well documented study contrasts the dismal 50-year record for the railroads with some current positive factors. Autos and heavy industry depend upon railroads, Federal authorities now recognize. Regional governments & shippers are contributing to maintenance of marginal branches. Coal, oil & other commodity holdings promise to balance certain companies' prospects. 14 tables & 9 appendixes highlight such topics as wage factors, maintenance factors, traffic, financials, debt, Penn Central reorganization and comparative company data. In-depth. **CE-469-T**

LONG-TERM OUTLOOK FOR IMPORTS IN U.S. AUTO MARKET Mar 77. 8 pp. $80. Imports represented 18.3% penetration in the 1975 U.S. market. This report views Japanese imports as the key to long-term trends and sees the presently undervalued Yen and traditional Japanese insulation from worldwide market cyclicality as factors portending definite limits to further Japanese penetration. **CV-369-T**

SCRAPPAGE UPDATE/AUTOS Apr 77. 8 pp. $80. The disappearance rate for older cars still lags historical levels despite a buildup of the older car population. This report analyzes the factors behind the lag and forecasts an underlying replacement demand to support scrappage levels up to 9.0 million units. **CV-401-T**

Banking/Insurance

OUTLOOK FOR BANKING Mar 77. 50 pp. $325. This thorough study forecasts an extended bank earnings recovery predicated on rising interest rates, improving commercial loan demand, manageable foreign earnings exposure factors and relatively stable underlying nonrelated differential trends in 1977. Thinking based upon the 10 largest domestic bank holding companies' performance. 31 tables. **CV-431-B**

VARIABLE LIFE INSURANCE: AN OUTSIDE VIEW Jun 77. 40 pp. $95. Detailed evaluation of history and future of variable life insurance. Review of its evolution, regulatory requirements and the early results of EVLICO's product. A poll of opinions within the industry as to its potential and ... an outsider's view of the appeal and possibilities. **CY-519-B**

MORTGAGE INSURANCE INDUSTRY & MGIC INVESTMENT CORP Apr 77. 40 pp. $175. Examination of factors which affect growth of this industry in order to project total industry growth. Then, extrapolation of results to major co's. Clear view of long-term industry potential and co. growth parameters. Individual co.'s evaluated for environment, share of new business, amount of insurance force, expenses & losses, capital availability & cost and earnings or losses from other areas. **CS-519-B**

"SQUARING THE TRIANGLE": PROPERTY-CASUALTY INSURANCE COMPANY LOSS RESERVES Mar 77. 42 pp. $375. Loss reserves constitute the largest single liability item in the industry's balance sheet. Ultimate contribution to profitability from higher premium rates and lower inflation depend upon factoring loss reserves. Here a detailed model is outlined and three major companies analyzed: GEICO, AETNA LIFE & CASUALTY, and TRAVELERS. **CV-439-B**

Government

RESEARCH FROM WASHINGTON FORTNIGHTLY $500/yr. subscription service. Comprehensive summary analysis of key events in Washington relating to HEALTHCARE, POLITICS, ENERGY, FINANCE, LABOR, TAXES and TECHNOLOGIES. A Washington-based group of analysts follow both "inside" and public developments and provide pointed commentary on current issues including in-depth studies. Often full texts of original government documents are highlighted. An excellent way to keep pace with the ofongoing government environment. **CHS-991**

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Wayne, N.J. 07470

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Hackensack, N.J. 07601

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William F Laman Pub Lib
N Little Rock, Ark. 72114

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Anchorage, Alaska 99504

IN THE

Supreme Court of the United States

No. 77-680

WALL STREET TRANSCRIPT CORPORATION
and RICHARD A. HOLMAN,

Petitioners,

v.

WAINWRIGHT SECURITIES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WAINWRIGHT SECURITIES INC. IN OPPOSITION

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December 14, 1977

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Supreme Court of the United States

No. 77-680

Wall Street Transcript Corporation
and Richard A. Holman,

Petitioners,

v.

Wainwright Securities Inc.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WAINWRIGHT SECURITIES INC. IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York, granting respondent's motion for a preliminary injunction, is reported at 418 F.Supp. 620. The unanimous opinion of the United States Court of Appeals for the Second Circuit, affirming the judgment of the District Court, is reported at 558 F.2d 91. As the opinions of the District Court and of the Court of Appeals are not accurately reproduced in the Petition for Certiorari, respondent respectfully requests that reference be made to the official reporters cited above.

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1977. Petitioners' Petition for Rehearing was denied by the United States Court of Appeals for the Second Circuit on August 16, 1977.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

Question Presented

The Court of Appeals upheld a preliminary injunction issued to prevent repeated publication by petitioners of unauthorized abstracts of respondent's copyrighted Research Reports. The abstracts are based entirely upon and consist entirely of verbatim extracts from and paraphrases of such Reports and present the projections, analyses and conclusions of such Reports. The courts below held that the abstracts infringed respondent's copyrights because the abstracts did not constitute a fair use of the Reports. The preliminary injunction does not otherwise prevent petitioners from publishing material containing references to or descriptions of the contents of any of respondent's copyrighted Reports, including the ones found to have been infringed by petitioners. The question presented is:

Whether the First Amendment requires that the preliminary injunction be dissolved notwithstanding the findings below, unchallenged here, that petitioners' abstracts are not a fair use of respondent's copyrighted Research Reports.

Constitutional Provisions and Statute Involved

The pertinent provisions of the United States Constitution (the Copyright Clause, Article I, Section 8, Clause 8;

and the First Amendment) are set forth in the Petition at page 34a. Pertinent provisions of the Copyright Act currently in force (17 U.S.C. §§ 1 *et seq.* (1970 & Supp. V 1975)) and of the new Copyright Law, effective January 1, 1978 (17 U.S.C.A. §§ 101 *et seq.* (Supp. 1977 at 227)) are set forth in the Appendix hereto.

Statement

This action for copyright infringement and unfair competition was commenced by respondent Wainwright Securities Inc. ("Wainwright") after repeated publications by petitioners of unauthorized abstracts of Wainwright's copyrighted Research Reports and after its requests that petitioners cease to do so went unheeded.* The abstracts consist entirely of verbatim extracts from and paraphrases of the Wainwright Reports, which are the sole source for the abstracts. Jurisdiction was conferred upon the District Court by 28 U.S.C. § 1338 (1970).

Wainwright is a brokerage firm engaged in the securities industry specializing in institutional research. Approximately 90% of its revenues and an even greater percentage of its profits are derived from its institutional research operation which involves approximately 80 professionally trained persons. Wainwright supplies its more than 900 institutional clients with in-depth, analytical Research Reports relating to approximately 275 industrial, financial, utility and railroad corporations and the ap-

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* Petitioners published abstracts of five copyrighted Wainwright Reports in *The Transcript* between May 10 and July 5, 1976. Wainwright protested the publication of the first three abstracts by letter dated and delivered on May 27, 1976. On May 31, 1976 petitioners published a fourth abstract. Counsel attempted to resolve the matter until petitioners published a fifth abstract on July 5, 1976. Wainwright commenced this action on July 9, 1976.

proximately 30 industries in which they are engaged. These corporations account for the bulk of the market value of a typical institutional equity portfolio as measured by capitalization. The Research Reports present the conclusions, analyses and projections of Wainwright's securities analysts, and are "an especially valued feature which distinguishes Wainwright's services from other brokers'." 418 F.Supp. at 627. Wainwright's Research Reports are duly copyrighted in accordance with the Copyright Act, 17 U.S.C. §§ 1 *et seq.* (1970 & Supp. V 1975). Contrary to petitioners' assertions (Petition, p. 4), Wainwright's Research Reports are not restricted to its clients, but are also sold for cash to non-clients and offered for sale by Find/SVP, an information clearinghouse.

Petitioner Wall Street Transcript Corporation publishes *The Wall Street Transcript ("The Transcript")*, which is a weekly publication. Petitioner Richard A. Holman controls the publishing company and is the Editor of *The Transcript*. One of *The Transcript's* features is the "Wall Street Roundup" which, as the District Court found, "consists largely, if not exclusively, of abstracts of reports prepared by institutional and business researchers." 418 F. Supp. at 622. *The Transcript* "advertises itself to the financial world as a purveyor of institutional research reports in abstract form." *Id.* A typical advertisement, which appeared in the July 5, 1976 issue of *Barron's* proclaims:

> ". . . now you can read 1,000 pages of institutional research in 30 minutes! First thing each week, THE WALL STREET TRANSCRIPT brings you a *fast-reading, pinpointed account of heavyweighted reports from the top institutional research firms.*
>
> "OUR WALL STREET ROUNDUP *will save you hundreds of hours of reading; report to you the highlights of thousands of institutional-level research reports* each year; and index every bit of it for you, immediately and continuously, for use whenever you want it. In addition, every account will give you full details as to who wrote the report, the date and the original length. . . ." 418 F.Supp. at 622 (emphasis added).

The extent of taking by petitioners' abstracts from Wainright's copyrighted Research Reports was illustrated by the Court of Appeals by the following comparison of statements contained in petitioners' abstracts on the left and corresponding statements from Wainwright's Reports on the right:

". . . 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment."	"The first of the 'surprises' alluded to above that strengthens 1976 prospects is the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment." (p.1)
"And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year."	"The second development likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year . . . ." (p.2)
"His estimated earnings for 1976 is $3.76 per share compared with earnings of $3.24 per share in 1975."	"Earnings (Years ending Dec. 31) . . . Actual 1975 .....$3.24 per share(b) Estimated 1976 .....$3.75 per share(c)

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	"(b) including LIFO profit of 20 [cents] per share and 12 [cents] per share benefit of change in pension funding assumptions.
". . . one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate sale of the Fiber Division."	". . . one of the most hopeful developments at FMC in recent years was the decision reached by management last year to attempt to negotiate sale of the Fiber Division . . . ." (p.4)
". . . the company could wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings."	". . . FMC would wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings." (p.6)
". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility."	". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, and that the major incremental financial cost to FMC will lie in the determination of what share of the *present* unreserved overrun is the company's responsibility." (p.7)

(558 F.2d at 96)

The District Court found that:

> "The takings have been substantial in quality, and absolutely, if not relatively substantial in quantity. Compelled by their very raison d'etre to present the *essence* of the Wainwright reports the Transcript abstracts suck the marrow from the bone of Wainwright's work without even the assertion of any independent research by the Transcript. There is, by the nature of an abstract, a special concentration on analyses, projections and conclusions: the elements of greatest value. Moreover, while the takings are not great in relation to the length of the reports they are nevertheless absolutely substantial in quantity." 418 F.Supp. at 625 (emphasis in the original).

The District Court rejected petitioners' assertion that their abstracts were protected by the First Amendment, held that petitioners' abstracts did not constitute a fair use of Wainwright's Reports, and found that they constituted derivative works under 17 U.S.C. §7 (1970), published without the consent of Wainwright. *Id.*

The District Court concluded that "Wainwright has without question made a prima facie showing of infringement" (*id.* at 627) and that a preliminary injunction was necessary to

> "shield [Wainwright] from the unmeasurable consequential damage to its brokerage business which could flow from making the contents of its research reports known without cost to competitors, potential clients and the public." *Id.*

On August 19, 1976 the District Court issued a preliminary injunction which was entered on August 20, 1976, and modified on October 12, 1976. The preliminary injunction prohibits petitioners, during the pendency of this action, from:

"(a) publishing, selling, marketing or otherwise disposing of any copies of the abstracts of plaintiff's copyrighted Research Reports set forth on pages 43,669, 43,689, 43,789, 43,845 and 44,163 of the May 10, May 17, May 24, May 31 and July 5, 1976 issues of *The Wall Street Transcript,* respectively; and

"(b) publishing, selling, marketing or otherwise disposing of any copies of any other abstracts of any of plaintiff's copyrighted Research Reports presented in the format of the feature 'Wall Street Roundup' of *The Wall Street Transcript* . . . ."

Although the District Court agreed to stay the preliminary injunction for five days to permit petitioners to apply to the Court of Appeals for a stay, no such application was made then, or at any time thereafter, nor did petitioners make any application to the Court of Appeals for a preference under § 27(e) of the Second Circuit Rules.

The Court of Appeals affirmed the decision of the District Court in all respects, observing, in its unanimous opinion dated June 15, 1977 that "the Transcript appropriated almost verbatim the most creative and original aspects of the [Wainwright] reports, the financial analyses and predictions, which represent a substantial investment of time, money and labor." 558 F.2d at 96. The Court of Appeals found that the petitioners'

"use of the Wainwright reports was blatantly self-serving, with the obvious intent, if not the effect, of fulfilling the demand for the original work . . . . This was not legitimate coverage of a news event, *instead it was, and there is no other way to describe it, chiseling for personal profit.*" 558 F.2d at 96-97 (emphasis added)

Five months after the Court of Appeals rendered its decision petitioners filed their Petition for Certiorari.*

ARGUMENT

This case falls well within the scope of the fair use doctrine under the Copyright Act. Petitioners' First Amendment argument to this Court was correctly rejected by both courts below. Similar arguments based upon the First Amendment have uniformly been rejected by other federal courts. *See Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corp.*, 562 F.2d 1157, 1169-71 (9th Cir. 1977); *United States* v. *Bodin*, 375 F.Supp. 1265, 1267 (W.D. Okla. 1974); *Robert Stigwood Group Ltd.* v. *O'Reilly*, 346 F.Supp. 376, 383 (D.Conn. 1972), *aff'd*, No. 72-1826 (2d Cir. May 30, 1973); *Walt Disney Productions* v. *Air Pirates*, 345 F.Supp. 108, 115 (N.D. Cal. 1972); *McGraw-Hill, Inc.* v. *Worth Publishers, Inc.*, 335 F.Supp. 415, 422 (S.D.N.Y. 1971).

The doctrine of fair use encompasses the First Amendment in the area of copyright protection. As the District Court observed:

"The tension between the First Amendment and the copyright statute which the Transcript professes to discern in such cases as this does not exist. It does not exist because the doctrine of fair use, discussed below, has been precisely contoured by the courts to

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* Petitioners did not file their Petition for Certiorari until the end of the ninety day period following denial by the Court of Appeals of their petition for rehearing or rehearing *en banc*. On December 6, 1977, eight days before Wainwright's Brief in Opposition was due, petitioners filed with Justice Marshall an application for a stay of the preliminary injunction pending disposition of the Petition for Certiorari. Wainwright filed a memorandum in opposition to petitioners' application on December 12, 1977.

assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation." 418 F.Supp. at 624

The Court of Appeals described the doctrine of fair use as creating

> "a privilege 'in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner . . . .' *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *quoting* Ball, *Copyright and Literary Property* 260 (1944). For example, a classic illustration of fair use is quoting from another's work in order to criticize it. The principle has most often been applied to works in the fields of science, law, medicine, history and biography. The fair use doctrine offers a means of balancing the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science and industry." (558 F.2d at 94)

Thus, a fair use analysis *includes* an evaluation of the public interest in dissemination of information, precisely the analysis engaged in by both courts that previously heard this case. Fair use involves the balancing of public and private interests. Copyright protection is granted in order to encourage authors to publish their works and make them generally available, thereby enriching society as a whole.

Petitioners' First Amendment argument fails to accommodate the important public interests which the Copyright Act serves. Unlike the privacy statutes, right of reply

statutes and right of publicity statutes which are the subject of cases on which petitioners rely, the Copyright Act is expressly authorized by Article I, Section 8 of the United States Constitution. As this Court recognized in *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954):

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

The First Amendment was never intended by its framers to nullify the Copyright Clause. In *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 57 (1884), this Court stated:

> "The construction placed upon the Constitution by the first [copyright] act of 1790, and the [copyright] act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, is almost conclusive."

Professor Nimmer, a leading authority on copyright, states:

> "The fact that the first amendment was approved by the Congress in 1789 and became effective in 1791 lends added credence to the conclusion that copyright is not prohibited by the first amendment. If it were, Congress would hardly have enacted the first Copyright Act on May 31, 1790, nor the amendment thereto on April 29,

1802." 1 *Nimmer on Copyright* § 9.21 at 28.3-28.4 n. 135 (1976).

This Court has scrupulously distinguished the area of copyright protection from other interests. In *New York Times Co.* v. *United States,* 403 U.S. 713, 726n. (1971), Justice Brennan's concurring opinion observes that "copyright cases have no pertinence here" (403 U.S. at 726n.), clearly indicating that the result would be different if the Copyright Act applied. That the result would indeed have been different is apparent from Justice White's concurring opinion (in which Justice Stewart joined) and which is dispositive of petitioners' argument in support of their Petition for Certiorari:

> "no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another." (403 U.S. at 731n. 1)

To abrogate copyright protection, as petitioners urge, would defeat the goal which the Copyright Clause and the First Amendment were both intended to serve, the dissemination of writings to the public.*

It is well established that the Copyright Act applies to newspapers. *New York Times Co.* v. *United States, id.* at 731n. 1; *L.A. Westermann Co.* v. *Dispatch Printing Co.,* 249 U.S. 100 (1919). *See also Best Medium Publishing Co.* v. *National Insider, Inc.,* 259 F.Supp. 433 (N.D. Ill.), *aff'd,*

* In *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 97 S.Ct. 2849 (1977), this Court rejected a First Amendment challenge to a state right of publicity law. The Court reasoned by analogy to the goals of patent and copyright law to provide "an economic incentive for [Zacchini] to make the investment required to produce a performance of interest to the public." *Id.* at 2857. The Court did not discuss the scope of the Copyright Act in *Zacchini,* nor did it consider the appropriateness of injunctive relief under the Copyright Act.

385 F.2d 384 (7th Cir. 1963), *cert. denied,* 390 U.S. 955 (1968); *Worthy* v. *Herter,* 270 F.2d 905, 908 (D.C. Cir.), *cert. denied,* 361 U.S. 918 (1959) ("Freedom of the press bears restrictions. It does not include the right to publish what another has registered with the copyright office."); *Chicago Record-Herald Co.* v. *Tribune Ass'n,* 275 F. 797 (7th Cir. 1921). As Justice White points out in his concurring opinion in *New York Times Co.* v. *United States, supra,* 403 U.S. at 731 n.1, "[n]ewspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events."

The Court of Appeals expressly noted (558 F.2d at 97) that the fair use doctrine has been codified as Section 107 of the new Copyright Law, Pub.Law No. 94-553, which becomes effective January 1, 1978, and that such section explicitly provides for the application of fair use to news reporting:

> "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, *news reporting,* teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C.A. § 107 (Supp. 1977 at 232) (emphasis added).

As the Committee Reports state, Section 107 was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976).*

It is no answer for petitioners to assert that their contention that the First Amendment protects copyright infringement by newspapers, is limited to "newsworthy statements".** As they well know, and correctly state in their petition, the government cannot tamper with the news or editorial content of the press, citing *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974) (Petition, pp. 16-17). If newspapers have the right to determine the subject matter of their news reports, and Wainwright does not contend otherwise, and if the Copyright Act, as petitioners con-

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* The Court of Appeals described Judge Lasker's "well-reasoned fair use analysis" (558 F.2d 97) as follows:

> "Judge Lasker found that the Transcript's abstracts did not constitute a fair use of the Wainwright reports because (1) the takings were 'substantial in quality, and absolutely, if not relatively substantial in quantity,' 418 F.Supp. at 625; (2) publication of the abstracts probably reduced the value of Wainwright's research reports; (3) the public interest in dissemination is not affected since the Transcript is not restrained from researching and preparing its own reports; and (4) such reports could be prepared from original materials. *See Marvin Worth Productions* v. *Superior Films Corp.*, 319 F. Supp. 1269, 1274 (S.D.N.Y. 1970)." 558 F.2d at 94.

** The United States Court of Appeals for the Ninth Circuit recently expressed disapproval of carving out newsworthy statements from copyright protection. *Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corp.*, 562 F.2d 1157, 1171 n. 17 (9th Cir. 1977). Petitioners assert that Wainwright's Research Reports are "newsworthy in their entirety". (Petition, p. 21)

tend, cannot constitutionally protect any writing which is made the subject of a news report, then there simply could be no copyright protection.

Contrary to petitioners' assertions in their Petition for Certiorari, the preliminary injunction does not prevent petitioners from publishing material containing references to or descriptions of the contents of Wainwright's copyrighted Research Reports, including the ones found to have been infringed by petitioners. The preliminary injunction only enjoins petitioners from publishing any other *abstracts* of Wainwright's *copyrighted* Research Reports in the *format* of the feature "Wall Street Roundup". The preliminary injunction was narrowly directed toward a continuing course of repetitive conduct which clearly infringed upon Wainwright's copyrights. The preliminary injunction does not even prevent petitioners from publishing Wainwright's copyrighted Research Reports in their entirety. Of course, should petitioners do so, they would infringe Wainwright's copyrights, but they would not violate the preliminary injunction.*

The preliminary injunction was issued because the District Court found that

> "There is every reason to believe that the publication of the extracts may materially reduce the demand for Wainwright's services. Furnishing its reports to its clients is an especially valued feature which distinguishes Wainwright's services from other brokers'.

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* Contrary to the assertion at page 5 of the Petition, the preliminary injunction does not prevent petitioners from circulating copies of the issues of *The Transcript* in which the infringing abstracts were published. The injunction specifically provides for deletion of such abstracts should petitioners wish to circulate copies of such issues.

> The Transcript's infringements impair the value of Wainwright's copyrighted material by making its contents available to other brokerage houses with which Wainwright competes. Moreover the infringements impair Wainwright's ability to publish its own abstracts or to authorize others to do so.
>
> • • •
>
> ". . . In the circumstances Wainwright is entitled to a preliminary injunction to protect its copyrighted property and to shield it from the unmeasurable consequential damage to its brokerage business which could flow from making the contents of its research reports known without cost to competitors, potential clients and the public." 418 F.Supp. at 627.

The Court of Appeals sustained these findings.

A more narrowly drawn preliminary injunction simply would not protect Wainwright. The injunction prevents petitioners from doing what they had done and assert the right to continue to do—print abstracts in the "Wall Street Roundup" format, comprising the "sum and substance" of Wainwright's copyrighted Reports without any independent research on their part and merely using verbatim extracts from and paraphrases of the Wainwright Reports.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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December 14, 1977

APPENDIX

APPENDIX

Relevant Statutory Provisions

The Copyright Act, 17 U.S.C. §§ 1 *et seq.*
(1970 & Supp. V 1975)

§ 1. *Exclusive rights as to copyrighted works.*

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art. . . .

§ 7. *Copyright on compilations of works in public domain or of copyrighted works; subsisting copyrights not affected.*

Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such

use of the original works, or to secure or extend copyright in such original works.

§ 101. *Infringement.*

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) *Injunction.*

To an injunction restraining such infringement . . . .

§ 112. *Injunctions; service and enforcement.*

Any court mentioned in section 1338 of Title 28 or judge thereof shall have power, upon complaint filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this title may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants.

Copyright Law, effective January 1, 1978,
17 U.S.C.A. §§ 101 *et seq.* (Supp. 1977 at 227)

§ 101. *Definitions*

As used in this title, the following terms and their variant forms mean the following:

• • • •

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

• • • •

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

• • • •

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

• • • •

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. . . .

§ 106. *Exclusive rights in copyrighted works*

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

§ 107. *Limitations on exclusive rights: Fair use*

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies

for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

§ 502. *Remedies for infringement: Injunctions*

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-680

WALL STREET TRANSCRIPT CORPORATION and
RICHARD A. HOLMAN,

Petitioners,

v.

WAINWRIGHT SECURITIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

This reply brief is respectfully submitted on behalf of petitioners Wall Street Transcript Corporation and Richard A. Holman in response to respondent Wainwright Securities, Inc.'s ("Wainwright") brief in opposition to the petition for writ of certiorari.

The Issue

This reply is necessary to refocus the issue in light of the prior briefings.* That issue is:

Is a newspaper's right to publish reports of copyrighted *newsworthy* statements entitled to the full protection of the First Amendment or is it a right defined and limited by the copyright doctrine of "fair use".

Put another way, is the right to publish reports of statements which have a tremendous economic impact on the public to be determined by a balancing of private commercial interests, or by the public's right to know.

Respondent concedes and the courts below believed that such material could be published, but that the right to do so must be narrowly circumscribed (because of the existence of respondent's copyright) by the admittedly vague and confining strictures of the fair use doctrine. The fair use doctrine was developed and is appropriate when one is dealing with the usual kind of copyrighted literary or artistic work. But, it is not appropriate when what is involved is a statement which is itself news.

There is no doubt that newspapers are subject to a great many laws and newspapers may infringe the copyright laws in many ways; but a newspaper cannot and does not infringe the copyright statute or any other statute when, as here, it truthfully reports news of public interest direct from the source.

Petitioners do not argue and would not be so presumptuous as to allege, as respondent suggested in its memorandum in opposition to petitioners' application for a stay made to Justice Marshall, at p. 2, "that the Copyright Law is unconstitutional insofar as newspapers are concerned."

* Petitioners' present counsel and his firm were substituted for petitioners' prior counsel after the petition for writ of ceriorari was filed.

Nor do they assert that the copyright laws are wholly prohibited by the First Amendment or that copyright cannot "protect any writing which is made the subject of a news report." (Resp. Br., p. 15). Respondent's characterizations of petitioner's argument, beyond their obvious overstatement of the latter's claims, simply miss the point.

Petitioners' contention is not that the Copyright Act may not constitutionally protect *any writing* which is the subject of a newspaper article.* Rather, they submit that newsworthy statements—statements which are themselves the news by their very nature and their far-reaching impact on the public—may not be protected by the copyright act in derogation of the press' right to publish and the public's right to know.

By failing to recognize the distinction between newsworthy statements and other copyrighted writings, the courts below allowed the private commercial interests of the parties to obscure the First Amendment implications of this case; and have ignored the public interest and the public's right to know.**

This error is particularly egregious given the nature of the material involved and the context of this case. Recent events have emphasized the importance of protecting,

* Petitioners readily acknowledge that where a "writing" is not in and of itself newsworthy, a newspaper is not free to infringe the author's copyright by appropriating the latter's form of expression. Quite obviously, the Transcript could not copy a news account appearing in The Wall Street Journal about a particular broker's report, because The Wall Street Journal's treatment of such a report is not itself the newsworthy event.

** *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 754-755 (1976). In the first *Virginia Board of Pharmacy* case, it was the lower court's preoccupation with the commercial interest of the pharmacist plaintiffs and its failure to consider the rights and interests of the public that led to the erroneous result which was corrected only in the second *Virginia Board of Pharmacy* case when there was a proper consideration of the public's right to know. Unlike this case, the first *Virginia Pharmacy* case was not presented to this Court.

indeed encouraging, the freest flow of financial information, and have confirmed the wisdom of past assertions by this Court that the health of our society is directly related to preserving the full freedom of press.

The Case In Context

The results of a survey, made public a week ago,* reveal that individual investors, whose numbers have dramatically shrunk over the years, are "disheartened and puzzled" because they recognize that "objective and timely information" is the lifeblood of prudent investment yet at the same time they, in contrast to the large institutional investors, are "handicapped by a lack of access to timely investment information". Not surprisingly, individual investors, according to the survey, have had to "turn to the press, which they believe is the most unbiased and immediate source of information" to fill the gap.

This plea of the individual investor is neither an entirely new phenomenon nor one expressed only by them. This survey confirms a critical national problem previously recognized by both government and economic experts. In 1974 the Treasury Department issued a special "Public Policy" report which expressed grave concern over the "disarray" of the nation's capital markets which the Treasury Department Report attributed in part to a "loss of public confidence in our securities markets".**

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* *See* The Wall Street Journal, December 28, 1977, at 10, col. 1-2, reproduced in the appendix hereto, pp. 1-2a.

** *See* Treasury Department paper entitled "Public Policy for American Capital Markets, 1974", relevant portions of which are reproduced in the appendix hereto at pp. 3-4a. As pointed out in Levine, 2 FINANCIAL ANALYSTS HANDBOOK 74 (1975) in a comment written by William E. Chatlos on the Treasury Department Report:

> "Put another way, the average investor simply feels that he cannot compete equitably in the marketplace if he does not have access to the same lexicon of information that his more formidable counterparts do."

As recently as November, 1977, Secretary of the Treasury Blumenthal expressed concern with the weak condition of the nation's equity markets and the enormous erosion in the number of individual shareholders in the last seven years (from 31 to 25 million). The Secretary stressed that this was not "merely a Wall Street problem" but concerned the "health of the economy—and our economic future", and that the crisis was attributable in part to the disenchantment of individuals who feel they cannot compete with the institutional investors.*

The Significance of the Injunction

Thus, the public's right to know, a right always of paramount concern, takes on special significance here. The right to know—the right to publish—the kind of financial news at issue in this case is essential to public belief in the fairness of the equity marketplace and, hence, is essential to the proper functioning of that marketplace and our economic and political institutions. Any bar to the publication of such news will further erode public confidence in those institutions.

The decision below is such a bar. By subjecting, to the strictures of the fair use doctrine, the freedom of the press to publish newsworthy financial information, that decision deprives the public of the free flow of such information. It prohibits the press from fully informing the public and thus helping to maintain the small investors' confidence in the integrity of our political and economic system. Thus, the decision below inhibits the press from performing the very function contemplated by the First Amendment.

If this Court does not grant certiorari because it believes the public's access to such information can be narrowly

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* *See* Speech of Secretary of the Treasury, W. Michael Blumenthal, on November 21, 1977, reproduced in the appendix hereto at pp. 5-11a.

circumscribed by the fair use doctrine, it will mean, in effect, that a deaf ear has been turned to the groundswell of concern and discontent shared by private citizens and the government alike as to the increasing deprivation of individual investors of meaningful financial and commercial information that is directly affecting their lives.

It will mean more. It will undercut the Government's declared national policy to encourage individuals to participate in our nation's equity markets. The decision below, if allowed to stand, will encourage the belief that the stock market is the playground of the rich and powerful, of the large institutional investors; for that decision has told the public, in plain and simple terms, that despite the fact that brokers' reports are the very events that trigger enormous impact on individual stocks and the entire economy, the public shall not know about them—or if they are to know about them at all, they may only be informed by the press within the confines of the fair use doctrine, as if such information were poetry, or fiction or college textbooks or cartoon characters.* But we are concerned here with none of these. We are talking about written statements of great concern to the public, statements by prominent entities who are writing about publicly-held companies in a way that results in the movement of immense sums of money and has an immediate and direct impact on individual investors and ultimately upon each of us and our economy.

*In support of their argument that the First Amendment is "encompassed" within the fair use doctrine, respondent cites (Resp. Br., p. 9) five lower court decisions, all of which involve either a theatrical or television production, phonograph records, cartoons or educational texts. None of those decisions in any way deal with news matters or newsworthy statements. Nor are the dicta of Justices Brennan and White in *New York Times Co.* v. *United States*, 403 U.S. 713, 726, 731 (1971) (cited at Resp. Br., pp. 12-13) at all relevant, let alone "dispositive of petitioner's argument."

We are talking about news. We are talking about news of immense public concern. We are talking about the press' right to accurately and truthfully report that news, and the concomitant right of the public to learn about it. Either the First Amendment guarantees that right or it does not. If it does guarantee that right, then the only remaining question is whether that right can be limited by the copyright laws. While this Court has never been presented with this precise question before, we submit its prior decisions compel a negative response.

Thus, even if the compelling circumstances revealed by the recent survey and set forth in the Governmental statements did not exist, it would be clear, under this Court's decisions in analogous cases, that the copyright laws cannot limit the First Amendment right of the public to know—or of a newspaper to report—*newsworthy* statements.

The Law

In the past the Court has recognized that the press' First Amendment right to publish truthful reports of newsworthy events cannot be limited by a right of privacy statute. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Indeed, excluding urgent questions of national defense, this Court has made clear that the First Amendment does not permit an injunction to issue, under any statute or common law doctrine, which would bar a newspaper from reporting the news. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

It must follow that the copyright statute cannot justify an injunction which bars accurate, truthful news reports. A contrary result would mean that injunctions could issue restraining news reports under privacy statutes or right

of publicity statutes or any similar statute which Congress or the States might enact. There are no public policy considerations which elevate the copyright statute above these other enactments and which would entitle it to the special treatment given it by the courts below.

Petitioners concede that if respondent's statements are not news, this petition should be denied. Respondent, however, has not denied these statements are news, nor can it.

Indeed, respondent's statements are news of the most meaningful sort. It is, of course, axiomatic that powerful people whether in public life or private life make news with their statements. In our free enterprise system, there are many private people whose statements have major impact on the public and on our economy. The public which bears the impact of such statements has an absolute right to know about them.

If a single broker's report issued by one of the nation's leading brokerage houses contains evaluations and conclusions about a major publicly-held company or an entire industry, and makes recommendations as to the investment merits of such corporation or industry which can cause 900 of the major financial institutions to divert hundreds of millions of dollars into or out of the stock of that company or industry, then that broker's report is news. It is news in the purest sense of the word, and every statement in that report is news. It is news because it is an event that triggers a reaction which may, for example, cut in half the market value of stock held by hundreds of thousands of investors, or it may double that value. And it is news because each time these massive movements of capital in our equity markets occur it has both an immediate and long range effect on the well-being and stability of not just the marketplace, but the nation's entire economy. It is

news because the cumulative effect of such broker's reports and the consequent movement of capital ultimately touch virtually every facet of our way of life, from governmental regulation of industry and capital markets to the modest pocketbooks of individual investors scattered throughout the country. Finally, and most important, it is news because the public has a right to know what it is that is motivating these investment decisions, what lies behind these movements of capital which directly affect the public's investments.*

And if one such broker's statement having such repercussions is news, then all such brokers' statements are news. Their newsworthiness is neither increased nor

* That these statements by brokers are news because of their impact on the public, their stocks, our marketplace and our economy has been recognized not only by the press but by experts and by legal authorities as well. Burton G. Malkiel, formerly a member of the President's Council of Economic Advisors and now director of the Financial Research Center at Princeton University, has said that such "brokerage firms specializing in research services to institutions wield enormous power in the market and can direct tremendous money flows in and out of stocks." Malkiel, A RANDOM WALK DOWN WALL STREET 170 (1973). Brokers' reserch reports have been said to be the "dominant rationale" for the stock trading decisions of institutional investors. Klein and Prestbo, NEWS AND THE MARKET 28 (1974). The opinions voiced by the leading industry specialists are "not just market comment; they often are the stuff that makes markets." Rolo and Nelson, THE ANATOMY OF WALL STREET 24 (1968). Not only do the daily newspapers and the business and financial press continually affirm the nationwide economic repercussions that can flow from such reports, but the courts have acknowledged the obligation of the financial press to keep the public informed. *See Reliance Insurance* v. *Barron's*, — F. Supp. — , 3 Med. L. Rep. 1033, 1038-1039 (S.D.N.Y. 1977). These well respected views lend credence to the affidavit submitted below by Myron Kandel, President of the Society of American Business and Economic Writers, that because of their significant impact on the economic and financial community:

> "In fulfilling its obligations to provide the public with comprehensive news and information it is essential for the business and financial press to be able to report on the contents of brokers' reports on a consistent continuing basis."

diminished because one financial newspaper, like The Wall Street Journal or Barron's, may choose to report them on a highly selective basis and another financial newspaper, like The Wall Street Transcript, may choose to report a great number of them. The number of times a newspaper chooses to report a certain type of news—no more than the form, content or style of such reporting—does not determine its newsworthiness.

Just as The New York Times has a regular column entitled "Supreme Court Roundup" which gives brief, accurate, highly condensed summaries of statements issued by the Supreme Court of the United States, so, petitioners, in a regular column entitled "Wall Street Roundup", give brief, accurate, highly condensed summaries of these newsworthy statements by leading brokers. While statements by brokers are routinely reported in the daily and periodical press, The Wall Street Transcript is one of the recognized sources from which individual investors throughout the country can learn about these statements.*

The Key Error Below

The granting and affirmance by the lower courts of an injunction so clearly forbidden by the Constitution and analogous case law can only be attributed to the lower courts' failure to recognize that what was involved here

* The Wall Street Transcript is available to all members of the public by subscription, or through numerous public and academic libraries. Though the Wall Street Transcript is a small newspaper, its availability to the public is clearly nationwide. Professor Paul F. Jessup, of the University of Minnesota, has observed in his book, COMPETING FOR STOCK MARKET PROFITS 15 (1974):

> "Individual investors will find it difficult to obtain directly a wide variety of brokerage-firm research reports over a long period of time. However, this hurdle can be overcome because The Wall Street Transcript and some magazines publish a selection of various reports . . . ."

A list of some 400 libraries across the country where the Transcript is available appears at pp. 31a, *et seq.*, of the appendix hereto.

was a news report of a newsworthy statement. Both courts misconceived both the character of respondent's research reports and the nature of petitioners' news summaries. The courts saw respondent's research reports (a sample of which is reproduced in the appendix hereto, p. 12-21a), as reporting and commenting on facts which may or may not be newsworthy. They did not see respondent's research reports as news *in and of themselves.* As a consequence, they did not see petitioners' news summaries (a sample of which is reproduced in the appendix hereto, p. 22a) as reports of newsworthy events, but rather as a borrowing of someone else's "form of expression" concerning readily available facts. But the lower courts' view missed the point, for it is the research report itself which is the news. *Compare Edwards* v. *National Audubon Society, Inc.,* 556 F.2d 113, 120 (2d Cir. 1977), *cert. denied sub nom., Edwards* v. *New York Times Co.,* 46 U.S.L.W. 3386 (December 13, 1977). It is the opinions, analysis and advice given in those reports which affect the price of individual stocks and directly impact the public stockholders and ultimately the economy. Thus, respondent's research reports were not reports *of* the news—they were themselves the news. It follows that the summaries published in petitioners' newspaper were, in the truest sense, news reports entitled to the full protection of the First Amendment.

Petitioners have conceded that if the research reports do not themselves constitute news, this petition should be denied. There can, however, be no doubt of the newsworthiness of the material involved here. One example should suffice. If Arthur Burns (or his successor) issued a statement which marshalled and analyzed a number of facts (interest rates, employment levels, money supply, etc.) and which contained an opinion based on those facts as to what the rate of inflation might be in the coming month, no one would doubt that his statement was news-

worthy, and that a summary of it (verbatim or otherwise) published by a newspaper would be a legitimate news story. Nor should there be any doubt that if Arthur Burns attached a copyright notice to his statement, the ability of the press to report on it would not in any way be limited, and that would be true if Mr. Burns issued one statement or one each month. No court would suggest that a newspaper would be limited to reporting the underlying facts (interest rates, etc.) and could not print Mr. Burns' analysis and views of those facts because to do so would be to "borrow his form of expression". The brokers' statements here are no different. The marshalling and analysis of facts and the opinions which constitute respondent's statements are no less newsworthy. Petitioners' right to treat them as news is no less clear, and neither that right nor the public's right to know can be eliminated by the decision of respondent to copyright its material.

It was the Court of Appeals' failure to recognize this essential point which led it to believe that petitioners' First Amendment rights must be determined by their ability to meet the criteria of the doctrine of fair use, a doctrine developed and applied in copyright cases where newsworthy statements were not involved, as exemplified by the decisions on which respondent relies. *See* note 1, p. 6, *supra*. Such criteria are completely irrelevant where, as here, the subject matter is itself a newsworthy statement. First Amendment rights to report important news cannot depend on a guess as to how a court might apply a doctrine as vague as fair use. To apply the fair use doctrine to the reporting of newsworthy statements would lead to that dangerous evil of self-censorship so often condemned by this Court.

The Court of Appeals' Misconception of Legitimate Journalism

The application of irrelevant copyright principles led to results which cannot otherwise be explained and in no event can be justified. Thus, the Court of Appeals distinguished news reports in The Wall Street Journal which summarized two of respondent's research reports in a strikingly similar fashion to the way in which they are treated by petitioners, on the ground that The Wall Street Journal published its two news stories a year apart, while petitioners' summaries were published regularly. 558 F.2d at 96. Surely, decisions as to how frequently a class of news should appear in a newspaper is something which must be left to its editor—and his decision on that score cannot be made a test of whether or not his publication of the news is protected by the First Amendment. Such distinctions may be relevant when copyrighted statements which are not themselves the news are in issue, but they are not relevant here.

In like manner, the form and content of the news report cannot be the touchstone of First Amendment protection. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). The Court of Appeals, however, felt that petitioners' news reports did not merit such protection because "unlike traditional news coverage, . . . the Transcript did not provide independent analysis or research; it did not solicit comments . . . and it did not include criticism, praise, or other reactions. . . ." 558 F.2d at 96. Putting aside whether the court was correct as to the proper content of news coverage, certainly how a news story is covered and what is included in a news report must be the province of the newspaper. No court should condition First Amendment protection on whether or not news reports conform to that court's concept of what constitutes proper or tradi-

tional coverage. This is especially so when that court's concept of legitimate journalism is so fundamentally wrong, as revealed in the Court of Appeals' statement that:

> "In a parallel manner, the essence or purpose of legitimate journalism is the reporting of objective facts or developments, *not the appropriation of the form of expression used by the news source.*" 558 F.2d at 96 (emphasis added).

No error contained in the opinion below is more egregious than that statement. In the first place, the concept that legitimate journalism does not appropriate the form of expression used by the news source is contradicted by The Wall Street Journal news report quoted in footnote 2 of the Court of Appeals' opinion (which the court implicitly approved as legitimate journalism); for that news report consists *solely* of direct quotations and paraphrases of a Wainwright report. Second, this Court has repeatedly held that once it is determined that a statement or event is newsworthy, the press is free to report that news in any manner it chooses, so long as its coverage is truthful and accurate. *Miami Herald Publishing Co.* v. *Tornillo, supra,* at 256; *Mills* v. *Alabama,* 384 U.S. 214 (1966); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 391 (1973). The Transcript's accounts of respondent's statements were unquestionably truthful, accurate and unbiased.

Third, the lower courts' analysis, and respondent's arguments to this Court, disregard the fact that all of the information from the broker's reports which petitioners publish is essential to accurately report those newsworthy statements. To report only the conclusion that a particular research report was either "bullish" or "bearish", without stating how or why that conclusion was reached, is to eliminate precisely that which makes the report newsworthy. The courts below failed to recognize that the conclusions

reached in a broker's report and the reasons for those conclusions are as much the news as the mere fact that he has issued a report. Quotations from, and paraphrase of, the news source is essential to truthful and accurate coverage of the news. As this Court suggested in *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971), when a news report focuses on what someone has said, rather than what they did, "full direct quotation of the words of the source, with all its qualifying language . . ." is the most appropriate means of reporting the newsworthy statement. *Id.,* at 286. *See also Edwards* v. *National Audubon Society, Inc., supra.**

These fundamental errors as to what constitutes legitimate journalism led the court to a conclusion totally unsupported in the record:

> "This was not legitimate coverage of a news event; instead it was, and there is no other way to describe it, chiseling for personal profit." 358 F.2d at 96-97.

Not only is the record, including the District Court's findings, devoid of any support for that statement, the record is clearly to the contrary. Petitioners and respondent are not in competition; each serves different interests for different purposes. The Transcript did not palm off respondent's or any other broker's report as its own work. The Transcript has been published weekly since 1963. It consists typically of 50 to 70 pages of economic, business and financial news and editorial comment.** It was a widely

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* Direct quotation and paraphrase is precisely the form of reportage utilized by the newspaper in *Edwards.* The Second Circuit deemed it an "exemplar of fair and dispassionate reporting" of what, there too, was a copyrighted newsworthy report. 556 F.2d at 120. This view is shared by journalism scholars. *See, e.g.,* J. Hohenberg, THE PROFESSIONAL JOURNALIST 160-61 (3d ed. 1973); G. Hough, NEWS WRITING 100-09 (1975); G. Mott, NEW SURVEY OF JOURNALISM 103-04 (4th ed. 1968); P. Sheehan, REPORTORIAL WRITING 69-73 (1974).

** Submitted herewith as a separate appendix and as a sample of a typical issue is the December 5, 1977 edition of the Transcript.

used and well-regarded publication long before 1974, when it started the "Wall Street Roundup" column. The typical summary of a broker's report averages less than 5% of the length of the statements issued by such brokers. The Wall Street Roundup column which contains these brief, accurate reports represents less than 15% of petitioners' newspaper, and the news summaries of respondent's reports constituted less than one-thousandth of the particular issues in which the news account appeared.

To suggest that the Transcript is a "chiseler" because it could have, but did not, itself research and prepare financial reports of the kind it reported about, again indicates the court's fundamental misunderstanding of the nature of those reports. The Transcript is a newspaper, not a brokerage house. It does not make the news, it merely reports it; and no research report prepared by it would serve the First Amendment function of informing the public of the impact an influential broker's report may have on a particular company or industry or the economy as a whole. It is respondent and other prominent brokers who, by their own choice, have placed themselves in a position of public importance where their financial statements and market analyses affect millions of people.*

* Respondent's attempt to suggest that it satisfies the public's right to know by stating that "Wainwright's Reports are sold for cash to non-clients" (Resp. Br., p. 4) is quite misleading. In the first place, at no time does Find/SVP inform the public of the availability of reports issued by any named broker, Wainwright or anyone else. Second, its catalogue only lists brokers' reports that are at least three months old. For example, the latest material offered (with no identification as to brokers' names) in Find/SVP's current catalogue (issued in October 1977) is June 1977. Third, these reports are sold for prices ranging from $50 to $325 for a single report. (*See* Appendix hereto, pp. 24-30a.) While respondent does not state the price charged "non-clients" for a typical report, if the distribution through Find/SVP is any indication, it is manifestly clear that these reports are not available in any meaningful way to the public.

The inference that the Wall Street Transcript is simply a "purveyor of institutional research reports in abstract form" (418 F. Supp. at 622) is totally unjustified. In the first place, respondent's incomplete quotation of petitioners' advertisement, upon which the Court of Appeals' unwarranted conclusion was based, fails to call to the Court's attention the fact that petitioners' advertisements, the publication of which long antedated the controversy herein, expressed in bold headlines addressed to the *public*: "You Have a *Right* to Know" and " an urgent need to get this timely news" (*see* appendix hereto, p. 23a). It also fails to point out that the text of that advertisement is not limited to the "Wall Street Roundup" column but also calls attention to other features in the Transcript, and that the reader of the advertisement is urged to "get all this *timely news* in the Wall Street Transcript" (emphasis added) and, in bold letters, that the reader should "ask for it at your Public Library" (*see* appendix hereto, p. 24a).

Moreover, the references in the advertisements to the "Wall Street Roundup" and other features of the newspaper are no different from many newspapers' advertising which highlights special features and columns having interest to certain segments of the public, such as consumers. Nor are they distinguishable from the advertisements of many tabloid newspapers that the reader can read more of the news more quickly in the condensed version of news reporting found in tabloids.

Finally, the fact that The Transcript, including the "Wall Street Roundup" column, is published and sold for a profit does not deprive it of First Amendment protection. *Time, Inc.* v. *Hill, supra,* 385 U.S. at 397, and cases cited therein.

The Court of Appeals' unwarranted and excessive preoccupation with the commercial interest of the Transcript, without regard to its primary function as a news source, led to the kind of analysis disapproved of by this Court in

Bigelow v. *Virginia*, 421 U.S. 809, 826 (1975), quoted in *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 91 (1977), where it was said:

> "Regardless of the particular label ['commercial speech' or otherwise] a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation" (material added).

The danger in such an approach is perhaps best illustrated by the *Virginia State Board of Pharmacy* cases *(compare Patterson Drug Co.* v. *Kingery*, 305 F. Supp. 821 (W. D. Va. 1969) *with Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), *aff'g* 373 F. Supp. 683 (E.D. Va. 1974). The first case involved a challenge to a Virginia statute which prohibited pharmacists from publishing the price of prescription drugs. The statute, when challenged first by certain pharmacists, was upheld by a three-judge federal court. 305 F. Supp. at 827. That case never reached this Court. When later challenged by consumer groups this Court held that the identical statute was unconstitutional because it violated the public's First Amendment right to know commercial information which had a direct impact on their well-being and their finances. In the consumers' suit, the opinions of this Court and the lower court (425 U.S. at 754-755, quoting from 373 F. Supp. at 686) suggest that although the First Amendment had been invoked in the first case, the "commercial" aspects of the pharmacists' case had obscured the First Amendment implications of the Virginia statute. But in the second case where, as here, the challenge was based squarely on the First Amendment, the statute was cast "in a different light". 425 U.S. at 769. The Court held that the statute violated the First Amendment rights of those who wished to publish prescription drug prices and those who needed or wanted to know about such prices.

For purposes of this petition it is unnecessary to compare the relative importance, social value or financial

impact on the public and our economy of publishing prescription drug prices on the one hand and broker's reports which precipitate the movement of hundreds of millions of dollars on the other hand. Suffice it to say that the individual investor's interest and need to know about the latter may, in the words of this Court, "be as keen, if not keener by far, than his interest in the day's most urgent political debate" (425 U.S. at 763) and that society itself "may have a strong interest in the free flow" of such information (425 U.S. at 764).

This Court in *Virginia State Board of Pharmacy* said that the First Amendment made the choice for it as between the beneficial purposes of the Virginia statute on the one hand, and keeping the public in ignorance on the other. 425 U.S. at 769. So too, here, the Court must make a choice between the mandate of the First Amendment to keep the public informed about significant newsworthy matters and an application of the copyright laws which unnecessarily impinges upon that mandate.

The question of when, if ever, the copyright laws can proscribe in any way the reporting of this class of statements which are themselves the news is, petitioners submit, a question of first impression in this Court. It has not been answered by any of the decisions cited by respondent,* nor is its resolution to be found in section 107 of the new Copyright Act.** The question cannot be resolved, peti-

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* Notably absent in respondent's memorandum is any mention of *Miami Herald Publishing Co.* v. *Tornillo, supra; Time, Inc.* v. *Pape, supra;* or *Edwards* v. *National Audubon Society, Inc., supra,* decisions of far greater relevance to the issue involved here. If respondent's position were sound, it would mean that although the First Amendment would bar a libel claim against the New York Times for the accurate and neutral verbatim reporting of a third party's newsworthy defamatory written statement (*see Edwards* v. *National Audubon Society, Inc., supra*), the New York Times could nevertheless be barred under the copyright statute from publishing that same statement if it were copyrighted as it was in *Edwards*. Petitioners do not believe the First Amendment would tolerate such an anomalous result.

** Section 107 makes only a general reference to "news reporting", and in no way deals with the distinction between a statement the

tioners contend, without consideration of the importance of the public's right to know about these newsworthy statements and of the prior decisions of this Court striking down statutes and common law doctrines where they impermissibly abrogate the press' right to truthfully report the news. *See, e.g., Miami Herald Publishing Co.* v. *Tornillo, supra; Nebraska Press Association* v. *Stuart, supra; Cox Broadcasting Corp.* v. *Cohn, supra; New York Times Co.* v. *United States, supra; Time, Inc.* v. *Hill, supra.* Notably absent in respondent's memorandum is any attempt to reconcile these unambiguous prior holdings with the decisions here of the courts below imposing and affirming restraints on a newspaper indistinguishable from those previously repudiated by this Court.

When weighed against the First Amendment interests asserted by petitioners, the copyright act, permitted but not mandated by the Constitution, can stand on no higher footing than right of privacy statutes, common law libel doctrine or any other legal basis advanced in support of an individual claimant's impermissible attempt to subordinate the press' First Amendment right to truthfully report the news. As this Court has said, deference to "mere labels", in derogation of paramount First Amendment considerations, cannot be countenanced, and that must be true whether that label is "libel", "secrecy" or "copyright."*

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making of which is itself the news, as opposed to one which, because of the facts contained therein, is newsworthy. Moreover, as respondent notes, section 107 was intended only to codify existing fair use analysis, analysis which heretofore has not focused on the issue framed by this petition.

* As this Court stated in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964):

> "In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (footnotes omitted).

CONCLUSION

This case involves an unprecedented conflict between the First Amendment and the copyright laws. That conflict can be resolved by affirming the earlier pronouncements of this Court holding that the First Amendment takes precedence over statutes which attempt to curtail public access to the news, or it can be resolved by mechanistic resort to the fair use doctrine. The latter course severely curtails public access to information of prime importance; it directly harms the public and, as is the case whenever the free flow of information is restricted, threatens our economic and political institutions. The courts below chose the latter course. Unless this petition is granted and the decision below reversed, First Amendment rights will be significantly diminished and there will be no way to avert the harm to the public and these institutions.

Dated: New York, New York
January 3, 1978.

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